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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

STEPHEN JUZWIN and MARY JUZWIN, his wife,

Petitioners,

vs.

ASBESTOS CORPORATION LTD., individually and as successor to Johnson's Company; CAREY CANADIAN MINES; AMTORG TRADING CORPORATION; and METROPOLITAN LIFE INSURANCE COMPANY; FLINKOTE MINES, LTD.; TURNER & NEWALL, P.L.C.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does the Commerce Clause of the United States Constitution prohibit a state from withholding a statute of limitations defense from corporate defendants who have failed to appoint an agent for service of process where such appointment does not, according to the state courts, subject the corporation to the general jurisdiction of the state courts?

2. If the Commerce Clause does prohibit such a tolling provision, should plaintiffs, who filed suit prior to the Court of Appeals' invalidation of the state statute, be subjected to a statute of limitations defense?

LIST OF PARTIES

The parties to the proceedings in the courts below were as follows:

Stephen Juzwin and Mary Juzwin (plaintiff-appellee below);

Asbestos Corporation Ltd. (defendant below);

Carey Canadian Mines (defendant-appellant/third-party plaintiff below);

Amtorg Trading Corporation (defendant/third-party plaintiff below);

Metropolitan Life Insurance Company (defendant below);

Flintkote Mines Ltd. (defendant/third-party defendant below);

Turner & Newall, P.L.C. (defendant/third-party defendant below);

Leonard J. Buck, Inc. (appellee/third-party defendant/fourth-party plaintiff below);

National Gypsum Company (third-party defendant below);

Lac D'Amiante du Quebec Limitee (third-party defendant below);

Bell Asbestos Mines Ltd. (third-party defendant below);

Associated Ore & Metal Corp., Ltd. (fourth-party defendant below);

Attorney General of New Jersey (plaintiff-intervenor below);

Wilentz, Goldman & Spitzer (Amicus Curiae below).

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No.

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OPINIONS BELOW

The denial of the petition for rehearing *en banc* by the United States Court of Appeals for the Third Circuit is reproduced as Appendix F (75a). The opinion of the United States Court of

Appeals for the Third Circuit is published at 900 F.2d 686 (1990) and is reproduced as Appendix A (1a).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit for which review is sought was entered on April 10, 1990. On May 9, 1990, the Court of Appeals denied petitioner's timely petition for rehearing *en banc*. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8 of the United States Constitution, provides in relevant part:

> The Congress shall have Power . . .
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . .

N.J. Stat. Ann. § 2A:14-22 (West 1987), provides:

> If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8 [53a-56a], or if any surety against whom there is a cause of action specified in any of the sections of Article 2 of this chapter, is not a resident of this State when such cause of action accrues, or removes from this State after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this State, against whom there

is such a cause of action, is not represented in this State by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this State or such corporation or corporate surety is not so represented within this State shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of non-residence or nonrepresentation.

A corporation shall be deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process. [51a].

STATEMENT OF THE CASE

Petitioners Stephen and Mary Juzwin brought suit in the Superior Court of New Jersey in July, 1987 to redress Stephen's injuries allegedly caused by his exposure to asbestos manufactured by, among others, respondent Carey Canada, Inc., a Canadian corporation. The case was removed by defendants to the United States District Court for the District of New Jersey.

Respondent then moved to dismiss the claim pursuant to New Jersey's two year statute of limitations, asserting that the Juzwins' claim expired two years after Stephen was diagnosed as having an asbestos-related injury in August, 1982. The District Court

denied the motion on the basis of the New Jersey tolling statute, N.J. Stat. Ann. § 2A:14-22 (West 1987), which suspended the running of the statute of limitations for any period in which respondent was not represented in the state by an agent for service of process (51a).

As respondent did not designate any representative within the state to receive process during the period after petitioner's claim arose, the court held the tolling statute applicable and denied the motion (27a). The court rejected respondent's contention that the statute imposed an impermissible burden on interstate commerce but certified the question to the Court of Appeals pursuant to 28 U.S.C. § 1292(b) (73a). The Attorney General of New Jersey intervened to defend the constitutionality of the statute (49a).

The Court of Appeals reversed, holding that the question was controlled by this Court's recent decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), 900 F.2d 686 (3d Cir. 1990) (1a). The court reached this conclusion notwithstanding the fact that the New Jersey statute had been construed by the New Jersey courts not to subject registering corporations to general jurisdiction in New Jersey. *Armenti v. Carey Canada, Inc.*, Doc. No. AM-177-88-T3F (November 4, 1988) (unpublished order) (47a). *See also, Cutler v. Raymark Industries*, 707 F. Supp. 168 (D.N.J. 1989) (rejecting Commerce Clause attack on tolling statute by construing corporate registration under the statute to not subject corporation to general jurisdiction). The Court of Appeals purported to accept, *arguendo*, the correctness of that statutory construction. 900 F.2d at 689 (7a).

The court, nonetheless, held the statute invalid under both the "heightened scrutiny" test reserved for statutes that discriminate against interstate commerce, 900 F.2d at 690 (11a), as well as under the more deferential "balancing test" of *Pike*

v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). *Id.* at 691-92 (12a). The sole basis for the court's conclusion that the statute imposed an unreasonable burden on interstate commerce was that out-of-state business might misconstrue the statute; since nonresident corporations could erroneously assume that they were required to submit to the general jurisdiction of the state courts in order to preserve their statute of limitations defenses, the court found that the statute placed an unreasonable burden on interstate commerce, even though that was not the intent of the New Jersey legislature. *Id.* at 691 (14a).

The court also held, without the benefit of any factual determinations by the District Court, that its ruling should be given retroactive application since petitioners should have been aware of the constitutional infirmity of the statute prior to the court's ruling; any reliance by petitioners on the statute was therefore unreasonable. *Id.* at 691-96 (12a-25a).

REASONS FOR GRANTING THE WRIT

In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), this Court struck down an Ohio statute that tolled the statute of limitations against defendants who previously failed to submit themselves to the general jurisdiction of the Ohio courts by appointing an agent for service of process. The instant petition arises out of New Jersey's attempt to give a saving construction to its statute in the light of *Bendix* by holding that the appointment of an agent for service of process pursuant to the tolling statute does not subject the defendant to general jurisdiction in New Jersey. The state thus attempted to redress constitutionally its interest in ameliorating the hardship caused by the running of the statute of limitation in cases where it could be difficult to identify, locate and serve a defendant not present in the state.

The opinion below rendered that attempt futile by virtually

ignoring the state courts' statutory construction and finding an impermissible burden on commerce in the potential for nonresident corporations to misconstrue the statute.

At least twelve states have statutory provisions that toll the statute of limitations against absent defendants. Most of those statutes are subject to the same constitutional challenge recognized by the court below. If other courts follow the Third Circuit's lead, there will be no opportunity to avoid the constitutional invalidation of those statutes through the use of narrowing statutory constructions.

Moreover, any *legislative* attempt to reconcile nonresident tolling statutes with *Bendix* has been undermined by the Third Circuit's conclusion that the statute was fatally overinclusive. The court held that New Jersey lacked a legitimate interest in ameliorating the impact of the statute of limitations where, because of defendant's absence from the state, service was rendered more difficult, but not impossible. 900 F.2d at 690 (10a). That holding was in direct conflict with this Court's decision in *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), a decision that rejected the *identical* overinclusivity attack on the New Jersey tolling statute asserted in the guise of an equal protection challenge. The decision below does not even attempt to distinguish *G. D. Searle*.

Thus, further guidance from this Court is necessary to avoid a wholesale and unwarranted invalidation of state legislation under *Bendix* and to facilitate this Court's well-established preference for avoiding constitutional adjudication though the use of narrowing constructions.

The impact of the lower court's judgment on New Jersey litigants is particularly pernicious. The intermediate appellate court of New Jersey has upheld the constitutionality of the statute. *Armenti v. Carey Canada*, No. AM-177-88-T3F (Super. Ct. N.J.

November 4, 1988) (unpublished order) (47a). Thus, unless the Supreme Court of New Jersey reverses that holding, litigants in federal court will be barred from bringing claims cognizable in the state courts until this Court resolves the question.

The opinion of the court below was a flagrant misapplication of this Court's Commerce Clause precedents. It subjected the statute to the heightened scrutiny of *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), solely because an erroneous conclusion that the statute on its face applies exclusively to nonresidents. In fact, the statute does not impose any burden on nonresident corporations that is not imposed equally on domestic corporations. While nonresident corporations must register with the state to preserve the statute of limitations defense, domestic corporations must appoint an agent for service of process as a precondition to obtaining corporate status. *See N.J. Stat. Ann.* §§ 14A:4-1 to 4-5 (West 1989) (53a-56a). The tolling statute does not, therefore, create any competitive advantages for New Jersey corporations or raise any entry barriers to the New Jersey markets, the *sine qua non* of a Commerce Clause violation under *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

Given the absence of any impact of the statute on interstate commerce, the court should have been relatively deferential to New Jersey's interest in the provision under the *Pike* balancing test. Instead, the court applied a form of a balancing test that was tantamount to strict scrutiny. The panel imputed to the statute the narrow purpose of assisting only those plaintiffs who were unable to serve defendants beyond the jurisdiction of the state courts. It then found, in flagrant disregard of *G. D. Searle v. Cohn*, the statute fatally overinclusive for extending the tolling principle to all absent defendants. In fact, as recognized by *G. D. Searle*, New Jersey has a legitimate interest in tolling the statute where timely service has, by defendant's absence, been rendered more difficult although not impossible. Rather than balance New

Jersey's interest in the statute, the court below simply substituted its own judgment as to the wisdom of the tolling statute for that of the New Jersey legislature.

I.

THE LOWER COURT'S DISREGARD OF THE SAVING CONSTRUCTION GIVEN TO THE STATUTE BY THE NEW JERSEY COURTS UNDERMINES A FUNDAMENTAL TENET OF JUDICIAL FEDERALISM AND THREATENS THE VALIDITY OF NUMEROUS SIMILAR STATUTES IN OTHER STATES.

State interests in ameliorating the impact of the statute of limitations for claims against absent parties are reflected in numerous state nonresident tolling provisions similar to the law struck down by the Court of Appeals. *See, e.g.*, Cal. Civ. Proc. Code § 351 (Deering 1988)[1]; Colo. Rev. Stat. § 13-80-118 (1989); Del. Code Ann. tit. 10, § 8117; Hawaii Rev. Stat. § 657-18, 480-24 (1989); Ill. Rev. Stat. ch. 110, § 613-208 (1988); Kan. Stat. Ann. § 60-517 (1988); Md. Cts. & Jud. Proc. Code Ann. § 5-204 (1989); Okla. Stat. Ann. tit. 12, § 98 (West 1988); Wis. Stat. § 180.847 (1988) (Appendix E, 64a-72a). By definition, those statutes offer defendants the option of preserving potential statute of limitation defenses by maintaining some presence in the state so as to facilitate personal service of process. In the case of corporate defendants not chartered in the state, that amenability to personal service of process can only be achieved by appointment of a representative

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1. The California statute was held violative of the Commerce Clause in *Abramson v. Brownstein*, 897 F.2d 389 (9th Cir. 1990). Unlike the instant case, the only way defendant there could have asserted the statute of limitations defense was by maintaining an actual presence in the state, a burden the Court of Appeals considered equivalent to the general jurisdiction burden imposed by the Ohio statute in *Bendix*. 897 F.2d at 392.

as the out-of-state corporation has no physical "presence", as such. *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945) (characterizing "presence" of out-of-state corporation as "legal fiction"). *See. e.g.*, Md. Cts. & Jud. Proc. Code Ann. § 5-204 (1989).

As this Court made clear in *G. D. Searle & Co. v. Cohn*, 455 U.S. 404, 410 (1982), the New Jersey tolling statute is a rational means for the state to take account of the obstacles faced by plaintiffs in suing a nonresident defendant in a timely fashion. Even where the nonresident defendant is within the reach of the state long-arm jurisdiction, as apparently was the respondent here, the added difficulty in identifying, locating, and serving the nonresident defendant justifies the extension of the statute of limitations for such claims.

This Court's recent decision in *Bendix Autolite* imposed an important limit on tolling statutes: a state may not condition the availability of a statute of limitations defense on a defendant's appointment of an agent for service of process where that appointment has the effect of subjecting the defendant to the general jurisdiction of the state courts.[2] Such a condition, the Court held, gives resident businesses an unfair competitive advantage in violation of the Commerce Clause: nonresident businesses will be dissuaded from competing in the state's markets if forced to choose between waiving their statute of limitations defenses or submitting to the general jurisdiction of the state courts

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2. A defendant subject to general jurisdiction is required to defend in the state courts any claim against it regardless of the claim's connection with the state. 486 U.S. at 893. *See generally, Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (describing due process limitations on assertions of general jurisdiction).

for claims against them arising anywhere in the United States.[3] 486 U.S. at 892-93.

It was this, and only this, coercion that produced the twin evils prohibited by the Commerce Clause: Ohio attempted to use its power over a local transaction to obtain general jurisdictional authority over out-of-state controversies, *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); and out-of-state corporations were thereby dissuaded from entering the Ohio markets, creating a competitive advantage for domestic corporations. *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

The *Bendix* decision in no way questions the validity of nonresident tolling statutes that do not condition the availability of statute of limitations defenses on the registrant's submission to general jurisdiction.[4] The absence of that condition

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3. While Ohio also, of course, asserted general jurisdiction over Ohio corporations, the statute nevertheless erected entry barriers since out-of-state corporations were placed at a competitive disadvantage in the Ohio market: if the out-of-state corporation chose to appoint an agent for service of process, it would be subject to general jurisdiction in both its home state as well as the other state, where resident businesses would be subject only to the general jurisdiction of their home state. The New Jersey statute generates no comparable advantage for New Jersey corporations.

4. In contrast to the situation here, the court in *Bendix* expressly noted that the Ohio statute was not susceptible to such a saving construction:

> The suggestion that Midwesco had the simple alternatives of designating an agent for service of process in its contract with Bendix or tendering an agency appointment to the Ohio Secretary of State is not persuasive. Initially, there is no statutory support for either option, and it is speculative that either device would have satisfied the Ohio requirements for the continued running of the limitations period. In any event, a designation with the Ohio Secretary of State of an agent

(Cont'd)

fundamentally changes the impact of the statute on interstate commerce: no business will be dissuaded from entering the state markets simply because it is required to register with the Secretary of State in order to preserve potential statute of limitations defenses. Where, as in the case of the New Jersey statute, registration has no affect on the registrant's amenability to personal jurisdiction, the only "burden" imposed on commerce is the *de minimus* cost of mailing notice to the state authorities.[5] *Cf.*, *G. D. Searle & Co. v. Cohn*, 455 U.S. at 413 (case remanded on Commerce Clause grounds to determine whether statute of limitations defense would be preserved simply by notifying the state of defendant's presence in the state).

Thus, in normal course, the impact of *Bendix* on the multitude of nonresident tolling statutes would be that the lower courts would have the opportunity to construe tolling statutes consistent with the constitutional limitations articulated by the Court. That process of avoiding the constitutional invalidation of state legislation through statutory construction is a central feature of judicial federalism. By giving states the opportunity to narrowly construe their laws in light of judicially articulated constitutional limits, the federal courts can avoid unnecessary friction with the states and needless displacement of state law. *See Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (lower court should have adopted construction of state law that would have avoided constitutional

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(Cont'd)

> for the service of process likely would have subjected Midwesco to the general jurisdiction of Ohio courts over transactions in which Ohio had no interest.

486 U.S. at 894-95.

5. There is only a nominal charge of $10 for registering the identity of the agent with the Secretary of State, N.J.S.A. 22A:4-1(a). Only corporations presently doing business in the State of New Jersey are subject to any tax. *See* N.J.S.A. 54:10A-2

difficulties): *Virginia v. American Booksellers Association*, 484 U.S. 383, 396 (1988) (question of state law certified to state courts to obtain construction that might avoid need for constitutional adjudication); *Harrison v. NAACP*, 360 U.S. 167, 176-77 (1959) (abstention is appropriate where state statute is susceptible of construction by state judiciary which might avoid necessity of constitutional issue).

The decision of the court below turns that process on its head. New Jersey's commitment to maintaining a constitutional form of the tolling statute is manifest. Within a year of *Coons v. American Honda Motor Co.*, 94 N.J. 307, 463 A.2d 921 (1983), *cert. denied*, 469 U.S. 1123 (1985), which held that an earlier version of the statute imposed excessive burdens of interstate commerce, the New Jersey legislature amended the statute to eliminate the requirement that nonresident corporations obtain a certificate of authority as a condition of asserting the statute of limitations. N.J. Pub. L. 1984 c. 131 (August 23, 1984). Thus, the state courts, as well as two federal district courts, had no difficulty in determining that the legislature would want the new statute construed in conformity with *Bendix*. *Armenti, supra; Cutler v. Raymark Industries*, 707 F. Supp. 168, 171 (D.N.J. 1989). *But see Robinson v. Visual Packaging, Inc.*, 705 F. Supp. 216 (D.N.J. 1989). The statute is silent as to the jurisdictional effect of registration, and the courts held that no jurisdictional effect would be imputed to registration. This was also the position taken by the New Jersey Secretary of State, who so informed any person making inquiry. *Cutler v. Raymark Industries*, 707 F. Supp. at 171.[6] The court below all but ignored those decisions. The court

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6. The court cited, *inter alia*, the following data:

> Such a limiting construction of 2A:14-22 is further suggested by the practice of the New Jersey Secretary of State in accepting designation of representatives for service of process.

(Cont'd)

based its conclusion that the statute imposes excessive burdens on interstate commerce not on the actual meaning of the statute as construed by the New Jersey courts, but on the potential for nonresidents to *misconstrue* the statute. The court feared that nonresident corporations might erroneously conclude that registration would subject them to general jurisdiction in New Jersey:

> Since the New Jersey statute does not *on its face* indicate whether designation of an agent for service of process subjects a corporation to general or limited jurisdiction, it is impossible for a foreign corporation to discern from the statute's wording what the consequences of designating an agent will be. Thus, prudence dictates that foreign corporations wishing to avail themselves of New Jersey's statute of limitations must inquire as to the consequences of designation under the statute. Moreover, given the wording of the tolling statute, foreign corporations may be understandably reluctant to rely on an informal practice of an administrative or executive body to protect

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(Cont'd)

> Plaintiff has supplied the affidavit of Paul E. Wermuth legal advisor to the New Jersey Secretary of State, who states that, upon the advice of the New Jersey Attorney General, the Secretary of State permits foreign corporations to limit their designations of representatives for service of process only to causes of action that would otherwise have the requisite minimum contacts with New Jersey. Wermuth Affidavit, p. 5. The New Jersey Attorney General, in his capacity as intervenor in this case, has also represented to the court that foreign corporations can limit the jurisdictional effect of their designation of a representative for service of process.

Id. at 171.

> themselves from exposure to the general jurisdiction of New Jersey.

900 F.2d at 691 (emphasis added) (footnote deleted) (13a-14a).

In so holding, the Court of Appeals abandoned the principle that unnecessary constitutional adjudication should be avoided if a statute can fairly be given a constitutional interpretation. The decision below needlessly requires a legislative revision of the statute simply to codify the interpretation already given to the statute by the New Jersey courts. The only possible benefit of such a revision, providing clearer guidance to nonresident corporations, would have been equally obtained by the court's *affirmance* of the District Court. In so holding, the court could have made well known that designation of an agent pursuant to the statute does not subject the registrant to general jurisdiction.

The danger posed by the decision goes beyond the needless invalidation of the New Jersey statute. If other courts follow the lead of the Third Circuit, any tolling statute that fails to state on its face that registering corporations are not subjected to general jurisdiction will be vulnerable to judicial invalidation regardless of the strength and clarity of contrary state legislative intent.

Specific guidance from this Court is thus necessary to prevent the needless wholesale displacement of state tolling statutes.

II.

THE DECISION OF THE PANEL BELOW WAS A MISAPPLICATION OF THIS COURT'S PRECEDENTS.

A. The Court Below Erroneously Subjected the New Jersey Statute to Strict Scrutiny Where No Discriminatory Burden Was Imposed on Interstate Commerce.

Judicial review of state statutes challenged under the Commerce Clause are governed by a two-track standard, similar to the two-tiered scrutiny of the Equal Protection Clause. Where a statute expressly erects a discriminatory barrier to interstate commerce, it must withstand a heightened scrutiny: it must appear that there is no means less restrictive of interstate commerce that will achieve an important state legislative objective. *Philadelphia v. New Jersey,* 437 U.S. 617 (1978). But "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). In short, the less that a statute burdens interstate commerce, the more latitude the state is granted to redress a legitimate domestic interest.

While "there is no clear line separating the category that is virtually per se invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach." *Brown-Forman Distillers v. New York State Liquor Authority,* 476 U.S. 573, 579 (1986), the distinguishing characteristic of cases applying heightened scrutiny is that interstate commerce has been singled out for discriminatory treatment. Interstate commerce, in those cases, has been subjected to a burden inapplicable to domestic transactions thereby creating competitive advantages for local businesses. *See, e.g., Philadelphia v. New Jersey,* 437 U.S.

617 (1978) (Pennsylvania garbage excluded from New Jersey disposal facilities); *New Energy Co. v. Limbach,* 486 U.S. 269 (1988) (grant of tax credit to sellers of ethanol produced in Ohio); *Sporhase v. Nebraska,* 458 U.S. 941 (1982) (Nevada law restricted transport of water out of state); *Hughes v. Oklahoma,* 441 U.S. 322 (1979) (statute forbidding export of minnows); *Dean Milk Co. v. Madison,* 340 U.S. 349 (1951) (all milk sold in state must be locally processed); *Maine v. Taylor,* 477 U.S. 131 (1986) (sustaining a Maine statute that required all bait used in fishing to be of Maine origin). No such discrimination exists here, and no competitive advantages were generated.

The sole basis for the lower court's application of the heightened scrutiny standard was its erroneous conclusion that the statute, on its face, "applies to out-of-state corporations but not to New Jersey corporations." 900 F.2d at 689 and n.3 (9a). The New Jersey tolling statute does not, in fact, single-out non-citizens for sanction. The tolling statute applies neutrally to *all* defendants who are not subject to personal service of process in the state. *Even a citizen who temporarily leaves the State is explicitly subject to the tolling provision for the period in which she was absent and not subject to personal service of process.*[7]

In the case of corporate defendants, amenability to personal service of process is measured not by physical "presence" in the State, but by the presence of agent authorized to receive process. It was precisely for this reason that the statute was amended in 1949: the previous tolling statute suspended the statute of limitations for claims against *all* absent defendants, and this had

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7. While finding the California tolling statute violative of the Commerce Clause, the Court of Appeals for the Ninth Circuit declined to subject the California statute to heightened scrutiny for this reason; absent parties were treated alike regardless of citizenship. *Abramson v. Brownstein*, 897 F.2d 389, 392 (9th Cir. 1990). The New Jersey statute, in this regard, is functionally equivalent to the California law.

been judicially construed to mean that out-of-state corporations could *never* assert the statute of limitations. Corporate registration was accordingly added as an option, not to penalize corporate defendants, but to put them on the same footing as any other defendant. *Velmohos v. Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372, 377 (1980), *vacated on other grounds*, 455 U.S. 985 (1982) *quoting* Statement Accompanying Assembly Bill No. 467 (1949).

Other provisions of New Jersey corporate law already guarantee the amenability of domestic corporations to personal service within the state. All New Jersey corporations must designate such an agent as condition to the grant of their corporate status. *See* N.J. Stat. Ann. § 14A:4-1 (West 1990) (56a). They are accordingly incapable of "leaving" the state. The tolling statute, accordingly, only addresses the problem of absent nonresident corporate defendants. No out-of-state corporation is subjected to a registration burden that is not applied equally to New Jersey corporations. No out-of-state corporation is consequently disadvantaged in competing in or outside of New Jersey. *Accord, Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (there can be no Commerce Clause violation absent the erection of an entry barrier to the state markets).

The formalistic approach employed by the Court of Appeals would subject even long-arm statutes to strict scrutiny since they assert jurisdiction only over persons residing out-of-state. N.J. Court Rule 4:4-4(c)(1). Obviously, the assertion of jurisdiction against persons residing in the state through other jurisdiction statutes renders the separate long-arm provisions non-discriminatory, and thus non-suspect.

B. The Lower Court's Application of the *Pike* Balancing Test Failed to Recognize New Jersey's Legitimate Interest in Its Tolling Statute, in Flagrant Disregard of this Court's Decision in *G. D. Searle & Co v. Cohn.*

Given the virtually non-existent impact of the New Jersey statute on interstate commerce, and the even-handed imposition of the registration requirement on foreign and domestic corporations alike, the court should have given substantial deference to New Jersey's interest in the registration requirement under the *Pike* balancing test: a statute "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142. Instead, the court exercised what was tantamount to very strict scrutiny: it held the statute fatally overbroad because tolling was not limited to claims against defendants beyond the long-arm jurisdiction of the state:

> As the district court recognized, New Jersey has a legitimate interest in "assist[ing] New Jersey citizens to pursue their claims against foreign corporations." New Jersey Senate Judiciary Committee's Statement to Senate Bill 953 (1984), dated February 23, 1984. The tolling statute is designed to further that interest by suspending "the running of the statute of limitations for foreign corporations that are not represented in New Jersey and thus cannot be reached with service of process." However, "[t]he purpose of the statute is not confined to providing relief when service is impossible. Even where absent residents could be served outside the State, the statute still provides for tolling." . . . We think New Jersey's legitimate interest could adequately be protected by a statute that permits a court to order the statute of

> limitations to be tolled when it is satisfied that, in spite of diligent efforts, long-arm service cannot be effectuated either because the corporation is beyond the reach of the long-arm rule or because it cannot be found for mail service.

900 F.2d at 690 (10a) (finding insufficient state interest under heightened scrutiny). *Accord, id.* at 691 (finding insufficient state interest under *Pike* balancing test) (12a-13a).

The lower court's conclusion that New Jersey had no legitimate interest in tolling the statute where service was not "impossible" was in flagrant disregard of this Court's decision in *G. D. Searle & Co. v. Cohn*, 455 U.S. 404, 410-11 (1982). In denying an equal protection challenge to an earlier version of the same statute at issue here, this Court rejected unequivocally the very argument relied upon by the court below:

> [R]ational reasons support tolling the limitation period for unrepresented foreign corporations despite the institution of long-arm jurisdiction in New Jersey. First, the unrepresented foreign corporation remains potentially difficult to locate. Long-arm jurisdiction does not alleviate this problem, since a New Jersey plaintiff must find the unrepresented foreign corporation before it can be served. . . .
>
> Second, the institution of long-arm jurisdiction in New Jersey has not made service upon an unrepresented foreign corporation the equivalent of service upon a corporation with a New Jersey representative. The long-arm rule, N.J.Ct.Rule 4:4-4(c)(1) (1969), prescribes conditions upon extraterritorial service to ensure

> that New Jersey's long-arm jurisdiction has been properly invoked. In *Velmohos*, the New Jersey Supreme Court explained: "Under our rules, extra-territorial service is not simply an alternative to service within the State. Plaintiffs may not resort to out-of-state service unless proper efforts to effect service in New Jersey have failed. The rule imposes a further burden on a plaintiff by requiring him to gather sufficient information to satisfy a court that service is 'consistent with due process of law.' " . . .
>
> Thus, there are burdens a plaintiff must bear when he sues a foreign corporation lacking a New Jersey representative that he would not bear if the defendant were a domestic corporation or a foreign corporation with a New Jersey representative.

Id. (citations omitted). The court below did not even attempt to distinguish *Searle*.

The statutory benefits recognized by *Searle* are particularly significant in cases such as the instant one where plaintiffs are charged under New Jersey substantive law with the significant burden of identifying and joining the specific producer of the commonly-produced product to which they were exposed long ago, manufactured years before suit, by a myriad of existing and defunct companies throughout the United States. *See Sholtis v. American Cyanamid Co.*, 238 N.J. Super. 8, 568 A.2d 1196 (App. Div. 1989) (rejecting market-share liability of asbestos manufacturers notwithstanding identification difficulties faced by plaintiffs); *Special Project: An Analysis of Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 Van. L. R. 573, 609-10 (1983); *The Fairness and Constitutionality of Statutes of Limitations for Toxic Torts*, 196 Harv. L. Rev. 168 (1983).

Rather than research the identity and location of any asbestos manufacturer that might have had a connection with New Jersey, plaintiff can make a simple inquiry of the Secretary of State. Defendants are then free to challenge by appropriate motion their amenability to jurisdiction. The statute, in a sense, shifts the initial burden of pleading personal jurisdiction to defendant.

The consequence of a defendant's failure to register is hardly draconian, and it bears a logical nexus to the statutory purpose: since defendant has made it marginally more difficult for plaintiff to identify and join it in a timely fashion, it is forced to defend the case on the merits. If significant time has elapsed since plaintiff's injury, plaintiff's burden of proof will be that much more difficult to sustain. Moreover, as noted by this Court in *G. D. Searle*, New Jersey law makes the equitable defense of laches available to defendants who can demonstrate that they have been predjudiced by plaintiff's delay in bringing suit. 455 U.S. at 411.

The lower court's conclusion that the burdens on interstate commerce are imposed by the tolling statute are "grossly disproportionate" to its putative benefits reduces the balancing test to little more than an opportunity for the courts to substitute their own judgment for that of the State Legislature. The New Jersey Legislature, to the lower court's obvious dismay, wanted to shift the odds slightly to plaintiffs' advantage. It treated the statute of limitations as something of a windfall and made it available only to those corporate defendants who had taken reasonable steps to notify plaintiffs of their whereabouts. That may not be the balance that the court would have struck as a legislative judgment, but there is nothing illegitimate or unconstitutional about it.

III.

THE LOWER COURT'S RETROACTIVE APPLICATION OF ITS HOLDING IS INCONSISTENT WITH THIS COURT'S RETROACTIVITY GUIDELINES.

The lower court's holding that its judgment must be given retroactive effect represents an inappropriate application of the standards laid out in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and *Lemon v. Kurtzman*, 411 U.S. 192 (1973). While those cases declined to prescribe any rigid formula for deciding whether to give a ruling retroactive effect, they established as the guiding principles equity, foreseeability, and vindication of the constitutional policy behind the decision:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07, (citations omitted). *Accord, Lemon v. Kurtzman*, 411 U.S. at 198-99.

Application of those principles here should have resulted in the prospective invalidation of the New Jersey statute only, or at a minimum, a remand to the District Court.

The principle basis for the lower court's decision that its ruling should be given retroactive effect was its determination, without the benefit of any findings of fact by the District Court, that petitioners should have foreseen the constitutional infirmities of the statute, and therefore could not have reasonably relied upon the statute in failing to bring suit earlier. 900 F.2d at 693-94 (19a-20a). The court placed heavy reliance on the fact that the earlier version of the New Jersey tolling statute was the subject to several constitutional challenges from 1983 to 1986. However, nothing in *that* litigation suggested that there was any constitutional deficiency in the new statute enacted in 1984, the basis for tolling the statute of limitations in this case. The new law was drafted specifically to cure the constitutional defects cited in the earlier litigation. *See* Senate Judiciary Committee Statement to Senate Bill 953 (1984), N.J. Stat. Ann. 2A:14-22 at 123 (amendment "is intended to meet the Supreme Court's objections as stated in the *Coons* decision and thereby assist New Jersey citizens to pursue their claims against foreign corporations") (52a).

The court nonetheless held that "it was a foregone conclusion that there would be a constitutional attack on the amended tolling statute" and that its holding was "clearly foreshadowed." 900 F.2d at 694 (21a). The only evidence cited by the court in support of that conclusion is the fact that the earlier statute had been challenged, and that the New Jersey tolling rule was more expansive than the majority of state provisions. *Id.* at 694-96 (21a-25a). The court thus charged petitioner with greater prescience than that apparently possessed by the entire New Jersey Legislature, who expressly thought that they had fixed the problem.

In marked contrast to the court's conclusion that petitioner

should have known the statute was unconstitutional is the court's expansive concern for businesses that might have been deterred from appointing an agent for service of process by a *mistaken assumption* about the jurisdictional effect of appointment. Plaintiffs are charged with uncanny legal forecasting skills, while defendants are relieved of responsibility for knowing existing law.

Moreover, in contrast to the court's focus on the specifics on petitioners' individual claim, the court ignored entirely the reasonableness of respondent's own conduct. While finding an impermissible burden on commerce solely in the potential of some businesses to misconstrue the statute, the court did not even consider whether respondent's own failure to appoint an agent for service of process was out of concern for the jurisdictional effects of registration. The court thus ignored whether the policies supporting its ruling would be advanced by giving retroactive effect to the decision.

The constitutional interest implicated, if at all, by the New Jersey statute is in the elimination of excessive burdens on interstate commerce, not in insulating respondent from liability. Requiring respondent to defend the claim on the merits would, in no way, undermine that policy. As the Third Circuit stated in declining to give retroactive effect to an earlier statute of limitations ruling:

> Certainly, any inhibiting effect the statute might have had on foreign corporations and others contemplating doing business in New Jersey vanishes once the statute is invalidated, whether or not that invalidation is retroactive. Moreover, had there been no tolling statute, the probability is that the Cohns and most other plaintiffs similarly situated would have filed suit within the two-year statutory period. Although it is possible that prospective invalidation will permit maintenance

> of some suits that would not have been timely filed absent the tolling statute, we do not think that this slight marginal burden, if any, does violence to the Commerce Clause.

Cohn v. G.D. Searle & Co., 784 F.2d 460, 465 (3d Cir.), *cert. denied*, 479 U.S. 883 (1986).

Finally, considerations of equity cannot support the court's ruling. Had the ruling been given prospective effect only, all conceivable burdens on commerce would have been eliminated, and respondents could have still asserted the doctrine of laches or, in any event, could have defended the case on the merits. The retroactive application of the decision defeats not only petitioner's claim, but the claims of thousands of similarly situated asbestos victims, all of whom are precluded from relying on the statute. *See generally, Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466 (1986) (noting that between eleven and thirteen million workers have been exposed to asbestos).

The New Jersey courts and legislature have struck a delicate balance in this area between liability assessing and liability insulating rules. The statute invalidated by the Court of Appeals was passed in the context of other rules, including the statute of limitations, that protect defendants and impose significant burdens on plaintiffs. Prospectively, New Jersey can assess whether to adjust that balance in light of the Court of Appeals decision. It cannot do so if the decision below is given retroactive effect. Respondent will be accorded a defense that the state may never have conferred under the circumstances. The retroactive application of the ruling is accordingly not only unfair to plaintiffs, but is an unnecessary usurpation of the state's regulatory prerogative.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Filed: April 10, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 89-5420

STEPHEN JUZWIN AND MARY JUZWIN, his wife

v.

ASBESTOS CORPORATION, LTD., individually and as successor to Johnson's Company; CAREY CANADIAN MINES; AMTORG TRADING CORPORATION; and METROPOLITAN LIFE INSURANCE COMPANY; FLINTKOTE MINES, LTD.; TURNER & NEWALL, P.L.C.; JOHN DOE CORPORATION (a fictitious name representing one or more corporations or companies, engaged in the business of mining, manufacturing, distributing or supplying finished and unfinished asbestos products and fibers to plaintiffs' employee GAF/Ruberoid); JUDY DOE CORPORATIONS (a fictitious name representing one or more legal entities who stand in the shoes of the John Doe defendants either as successor in interest, alter ego, or by other equitable doctrine which makes them responsible for the John Doe liability).

AMTORG TRADING CORP.,

Third-Party Plaintiff,

v.

Appendix A

LEONARD J. BUCK, INC., FLINTKOTE MINES, LTD., NATIONAL GYPSUM COMPANY and TURNER & NEWALL, P.L.C.,

Third-Party Defendants.

and

CAREY CANADA, INC.,

Defendant and Third-Party Plaintiff,

v.

LAC D'AMIANTE DU QUEBEC LIMITEE, individually and as successor to LAKE ASBESTOS OF QUEBEC, LTD. and BELL ASBESTOS MINES LIMITED,

and

LEONARD J. BUCK, INC.

Third-Party Defendant and Fourth Party Plaintiff.

v.

ASSOCIATED ORE & METAL CORP., LTD.

Fourth-Party Defendant,

CAREY CANADA, INC.,

Appellant.

Appendix A

Appeal from the United States District Court
for the District of New Jersey (Newark)
(D.C. Civil No. 87-3876)

Argued October 16, 1989

BEFORE: BECKER, COWEN and SEITZ,
Circuit Judges.

(Filed: April 10, 1990)

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Appendix A

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Appendix A

OPINION OF THE COURT

SEITZ, *Circuit Judge.*

Carey Canada, Inc., (defendant) appeals from an interlocutory order of the district court denying its motion for summary judgment based on the New Jersey statute of limitations. The district court concluded that N.J. Stat. Ann. § 2A:14-22 (West 1987) (the "tolling statute") is constitutional. Therefore, defendant's failure to designate a representative to accept service of process pursuant to that statute tolled the statute of limitations. The district court certified the order under 28 U.S.C. § 1292(b) (1982). Since that order involves a controlling question of law as to the constitutionality of the tolling statute, we granted permission to appeal.

I.

Stephen and Mary Juzwin (plaintiffs) brought suit in the Superior Court of New Jersey, alleging that Stephen's asbestos-related ailments were caused by exposure to asbestos fibers supplied by defendant and others. Upon application of defendant Amtorg Trading Corporation, the action was removed to the United States District Court for the District of New Jersey.

Plaintiffs admit that this cause of action arose in 1982 when Stephen Juzwin was diagnosed as having asbestosis and concede that they did not institute legal proceedings within the New Jersey two-year statute of limitations period. *Juzwin v. Amtorg Trading Corp.*, No. 87-3876, slip op. at 4 (D.N.J. filed February 28, 1989). Thus, plaintiffs' action is barred unless, as the district court concluded, that statute of limitations was tolled pursuant to New Jersey's tolling statute. *Id.* at 14.

Appendix A

New Jersey's tolling statute provides in pertinent part:

> If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8 . . . is not a resident of this State when such cause of action accrues . . . or if any corporation or corporate surety not organized under the laws of this State, against whom there is such a cause of action, is not represented in this State by any person or officer upon whom summons or other original process may be served, when such cause of action accrues . . . the time or times during which such person or surety is not residing within this State or such corporation or corporate surety is not so represented within this State shall not be computed as part of the periods of time within which such action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.
>
> A corporation shall be deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process.

N.J. Stat. Ann. § 2A:14-22 (West 1987).[1]

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1. New Jersey's present tolling statute was adopted in 1984, replacing a (Cont'd)

Appendix A

Defendant, a corporaton formed under the laws of Canada, has no corporate offices in the state of New Jersey, has never been registered to do business there, and has not appointed an agent for service of process with the Secretary of State. Thus, it is not "represented" in New Jersey within the meaning of the tolling statute. It appears to concede, however, that it was properly served under New Jersey's long-arm court rule, N.J. Ct. R. 4:4-4(c)(1).

Citing *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988), defendant moved for summary judgment on the ground that the tolling statute violates the commerce clause. In *Bendix,* the Supreme Court invalidated an Ohio tolling statute which required a foreign corporation to subject itself to the general jurisdiction of the Ohio courts, "whether or not the transaction in question had any connection with Ohio," in order to gain the protection of its statute of limitations. *Bendix*, 486 U.S. at 892.

The district court concluded that, unlike the Ohio statutory scheme, the New Jersey tolling statute does not compel the conclusion that designation of an agent for service of process subjects a foreign corporation to the general jurisdiction of the New Jersey courts. The court noted that the Secretary of State's practice of accepting designations of a representative for service of process only for causes of action having a nexus with New

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(Cont'd)

statute found unconstitutional in *Coons v. American Honda Motor Co.*, 463 A.2d 921 (N.J. 1983) (*Coons I), on rehearing*, 476 A.2d 763 (N.J. 1984) (*Coons II), cert. denied*. 469 U.S. 1123 (1985). The New Jersey Supreme Court held that requiring a foreign corporation to obtain a "certificate of authority" to do business in New Jersey in order to achieve "representation" and gain the benefits of the statute of limitations unconstitutionally burdened interstate commerce. *Id.* at 927.

Jersey. Such a limited designation, the court held, imposed no unconstitutional burden on interstate commerce.

II.

As we read *Bendix*, the New Jersey tolling statute would be invalid if it were applied to all foreign corporations, regardless of their connection with New Jersey. However, we will assume without deciding that the New Jersey Supreme Court would interpret the statute to permit designation of an agent for service of process only for causes of action having a nexus with New Jersey. The issue then becomes whether the statute so interpreted still constitutes an impermissible burden on interstate commerce. Our standard of review is plenary.

It may be helpful at the outset if we review the three standards of review that are applied in performing a dormant commerce clause inquiry:

> 1) state actions that purposefully or arbitrarily discriminate against interstate commerce or undermine uniformity in areas of particular federal importance are given heightened scrutiny; 2) legislation in areas of peculiarly strong state interest is subject to very deferential review; and 3) the remaining cases are governed by a balancing rule, under which state law is invalid only if the incidental burden on interstate commmerce is clearly excessive in relation to the putative local benefits.

Ford Motor Co. v. Insurance Comm'r of Pa., 874 F.2d 926, 941 (3d Cir. 1989), *cert. denied sub nom. United Services Auto.*

Ass'n v. Foster, 110 S.Ct. 418 (1989) (citing *Norfolk Southern Corp., v. Oberly,* 822 F.2d 388, 398-99 (3d Cir. 1987)).[2]

While heightened scrutiny is the standard of review for simple economic protectionism, "[this] category of protectionism includes those state measures that discriminate on their face against out-of-state interests or in favor of in-state interests." *Norfolk Southern Corp.,* 822 F.2d at 400 (citations omitted). Because the New Jersey tolling statute applies to out-of-state corporations but not to New Jersey corporations,[3] it comes within the class of statutes that are subject to heightened scrutiny. *See Old Coach Dev. Corp. v. Tanzman,* 881 F.2d 1227, 1231 (3d Cir. 1989) (citations omitted).

To pass the heightened scrutiny test, the state is required to "demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Id. (*quoting *Maine v. Taylor,* 477 U.S. 131, 138 (1986) (quoting *Hughes v. Oklahoma,* 441 U.S. 322, 336 (1979)). "In practice, such heightened scrutiny is applied with considerable rigor and turns out to be 'a virtually *per se* rule of invalidity.' " *Norfolk Southern Corp.,* 822 F.2d at 400 (quoting *Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978)).

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2. None of the parties argue that the correct standard to be applied to the New Jersey tolling statute is that of deferential review. New Jersey has, of course, legitimate interest in facilitating the claims of its citizens, but we are not here concerned with a "peculiarly strong" state interest, such as public health or safety. These are the areas that most commonly invoke the deferential standard.

3. The critical words are "any corporation or corporate surety not organized under the laws of this State." N.J. Stat. Ann. § 2A:14-22 (West 1987).

Appendix A

As the district court recognized, New Jersey has a legitimate interest in "assist[ing] New Jersey citizens to pursue their claims against foreign corporations." New Jersey Senate Judiciary Committee's Statement to Senate Bill 953 (1984), dated February 23, 1984. The tolling statute is designed to further that interest by suspending "the running of the statute of limitations for foreign corporations that are not represented in New Jersey and thus cannot be reached with service of process." *Id.*

However, "[t]he purpose of the statute is not confined to providing relief when service is impossible. Even where absent residents could be served outside the State, the statute still provides for tolling." *Velmohos v. Maren Eng'g Corp.*, 416 A.2d 372, 380 (N.J. 1980), *vacated*, 455 U.S. 985 (1982). We think New Jersey's legitimate interest could adequately be protected by a statute that permits a court to order the statute of limitations to be tolled when it is satisfied that, in spite of diligent efforts, long-arm service cannot be effectuated either because the corporation is beyond the reach of the long-arm rule or because it cannot be found for mail service. *See Bendix*, 486 U.S. at 898 (Scalia, J., concurring). Indeed, there is a somewhat related procedure in New Jersey with respect to unknown defendants.[4]

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4. New Jersey court rules permit plaintiffs to file complaints against "John Doe" defendants. N.J. Ct. R. 4:26-4 provides in pertinent part:

> [I]f the defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient to identify him.

"[T]he complaint may be amended after the statute of limitations has run to substitute the defendant's true name and effect service on him, particularly

(Cont'd)

While a narrowly tailored statute would still differentiate between in-state and out-of-state defendants, the differentiation would be based on the inability to locate or reach, not on the attribute of being foreign. "[W]hatever [a state's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978) (emphasis added).

Thus, we hold that the New Jersey tolling statute is invalid under heightened scrutiny[5] because New Jersey has offered no reason why the state's legitimate purpose could not be served as

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(Cont'd)

where the defendant can show neither prejudice resulting from nor reliance upon the lapse of time." Pressler, Current N.J. Court Rules, Comment R. 4:26-4 at 905 (1989) (citing *Farrell v. Votator Div. of Chemetron Corp.*, 299 A.2d 394 (1973).

However, the New Jersey fictitious defendant rule is not available to a plaintiff in federal court since it is a procedural device, not a rule of substantive law. Fed. R. Civ. P. 15(c), the analogous federal rule, does not permit the amendment to relate back.

5. Compare *Abramson v. Brownstein*, 897 F.2d 389, ____ (9th Cir. 1990), where the Ninth Circuit recently applied the balancing test to the California tolling statute since "[o]n its face, California's tolling statute is nondiscriminatory because it treats alike residents and nonresidents of California." The court declared the statute unconstitutional under the commerce clause because, "[l]ike the defendant in *Bendix*, the California long arm statute would have permitted service on Brownstein throughout the limitations period." *Id.* at ____ .

well by the adoption of a more narrowly drawn statute.[6] *See Old Coach Dev. Corp.*, 881 F.2d at 1234.

In spite of our holding, we are constrained, as was the Supreme Court in *Brown-Forman Distillers v. New York Liquor Auth.*, 476 U.S. 573, 579 (1986), to recognize how difficult it is to draw the line between a statute that is virtually *per se* invalid and one that must be analyzed under the balancing test enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Plaintiffs argue that *Bendix* mandates use of the less rigorous *Pike* balancing test. We disagree. The *Bendix* court said:

> The Ohio statute before us *might* have been held to be a discrimination that invalidates without extended inquiry. We *choose*, however, to assess the interests of the State, to demonstrate that its legitimate sphere of regulation is not much advanced by the statute while interstate commerce is subject to substantial restraints.

Bendix, 486 U.S. at 891 (emphasis added). We read this passage to mean that either approach is permissible. As in *Bendix*, however, the selection of the test in this case is not outcome-determinative, for even under the balancing test, the statute cannot survive.

Under the *Pike* test, if the state interest being advanced by

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6. Since we hold that the statute is invalid under the commerce clause because it impermissibly burdens interstate commerce, we do not reach defendant's argument that it should be struck down as a burden on foreign commerce.

the statute outweighs the burden imposed on interstate commerce, then the statute is valid, unless some less onerous means could be adopted by the state that would accomplish its purpose. *Pike*, 397 U.S. at 142.

While the state has articulated a legitimate interest in assisting its citizens to pursue their claims against foreign corporations, New Jersey's long-arm rule provides a relatively simple means of promptly effecting service of process on most foreign corporations. It is true that long-arm service is procedurally more demanding for a plaintiff then service on a New Jersey agent. However, once a plaintiff has determined "after diligent inquiry" that personal service cannot be made in New Jersey and that out-of-state service is "consistent with due process of law," then service may be effectuated, at less expense than personal service, by registered or certified mail directed to the corporation's principle place of business. N.J. Ct. R. 4:4-4(c)(1). This method does not seem unduly burdensome for the party initiating the action.

Plaintiffs argue that in order to use the long-arm rule, one must first locate the defendant. As we indicated in the foregoing discussion, a more narrowly drawn tolling statute would still assist New Jersey citizens to pursue claims against foreign defendants who cannot be found by tolling the statute of limitations, thereby eliminating that possible defense.

Opposite the putative local benefit of the tolling statute we must place the burden on interstate commerce. Since the New Jersey statute does not on its face indicate whether designation of an agent for service of process subjects a corporation to general or limited jurisdiction, it is impossible for a foreign corporation to discern from the statute's wording what the consequences of designating an agent will be. Thus, prudence dictates that foreign

corporations wishing to avail themselves of New Jersey's statute of limitations must inquire as to the consequences of designation under the statute. Moreover, given the wording of the tolling statute, foreign corporations may be understandably reluctant to rely on an informal practice of an administrative or executive body to protect themselves from exposure to the general jurisdiction of New Jersey.

We disagree with the district court's conclusion that the burdens on interstate commerce are no more than the need to determine the consequences of designating an agent and the act of designating such an agent. The real burden is that foreign corporations unrepresented but possibly amenable to long-arm service must make the difficult choice whether to file designations (with uncertain consequences) or forego a potential limitations defense, a burden that neither New Jersey corporations nor foreign corporations registered to do business in New Jersey bear.[7]

The magnitude of such a burden on many nonresident corporations is grossly disproportionate to the state's interest in assisting resident plaintiffs in the pursuit of claims against foreign corporations.

Thus, even with a limiting construction, N.J. Stat. Ann. § 2A:14-22 violates the commerce clause under either test since

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7. The origins of the New Jersey tolling statute date back to 1820. *Velmohos v. Maren Eng'g Corp.*, 416 A.2d 372, 376 (N.J. 1980), *vacated*, 455 U.S. 985 (1982). In the original version, there was no specific reference to corporations. *Id.* The tolling statute remained largely unchanged until 1949, when the legislature amended it to provide an exemption for domestic corporations and those foreign corporations maintaining representatives in New Jersey, thereby extending to them the benefits of the state's statutes of limitations. *Id.* at 377.

a nondiscriminatory procedure, less budensome to interstate commerce, could be adopted by New Jersey.

III.

The parties urge that, if we find the New Jersey statute unconstitutional, we should then go on to decide whether our ruling applies retroactively. Although the retroactivity issue was not part of the question certified under section 1292(b), we recognize that our review is of orders and not of isolated legal questions. *Miller v. Bolger,* 802 F.2d 660, 666 (3d Cir. 1986). "It follows that we are free to consider all grounds advanced in support of the grant of summary judgment and all grounds suggested for sustaining its denial." *Id.* (citations omitted). Thus, we turn now to consideration of the retroactivity issue.

Plaintiffs argue that we are obliged to follow the lead of the New Jersey Supreme Court which previously held in *Coons II* that the unconstitutionality of the prior tolling statute would be prospectively applied.

Plaintiffs are mistaken. As we said in *Cohn v. G.D. Searle & Co.,* 784 F.2d 460 (3d Cir.), *cert. denied,* 479 U.S. 883 (1986), "Where a state statute is held to violate the federal Constitution, the retroactivity *vel non* of that holding is similarly a matter of federal law which we must determine independently." *Id.* at 463 (citations omitted).

As the Supreme Court has noted, "The process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old is 'among the most difficult of those which have engaged the attention of courts, state and federal . . . '" *Lemon v. Kurtzman,* 411 U.S. 192, 198 (1973)

(*Lemon II*) (quoting *Chocot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 374 (1940)). It is not surprising, then, that modern jurisprudence recognizes no set principle of retroactivity.[8] Instead, modern decisions reflect a balancing approach which recognizes that "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct." *Id.* at 199. Justice Harlan aptly called this approach the "ambulatory retroactivity doctrine." *Mackey v. United States,* 401 U.S. 667, 681 (1971) (Harlan, J., concurring).

In *Chevron Oil Co., v. Huson,* 404 U.S. 97 (1971), the Supreme Court stated a three-factor test for determining whether a new rule of law is to be applied retroactively:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the

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8. Thus, a decision may be applied retroactively, nonretroactively or even prospectively. "Retroactive" describes judgments applicable in all cases, regardless of when the cause of action arose or the case was litigated. "Nonretroactive" judgments are those that apply the "new" law to the parties before the court and future cases, but not previous or pending cases. "Prospective" judgments govern only future cases, reaching neither the parties before the court nor any previous or pending cases. *Cohn,* 784 F.2d at 462 n.5 (citing *Marino v. Bowers,* 657 F.2d 1363, 1375 n.4 (3d Cir. 1981) (Weis, J., dissenting). *See Generally* Beytagh, *Ten Years of Non-Retroactivity; A Critique and a Proposal.* 61 Va.L.Rev. 1557 (1975); R. Aldisert. *The Judicial Process* 877-938 (1976).

> rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07 (citations omitted).[9]

The application of the *Chevron* factors is particularly difficult where, as here, we are determining the appropriate scope of federal equitable remedies regarding the enforcement of a state statute during the period before it was declared unconstitutional. *Lemon II*, 411 U.S. at 199. Our task in such cases is to shape the remedy as a blend of what is necessary, what is fair, and what is workable. *Id.* at 200.

Because of the continuing presumption in favor of retroactivity, we can refuse to give the rule retroactive effect only where on balance the weight of the three *Chevron* factors favors prospective application. *See, e.g., Al-Khazrahji v. Saint Francis*

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9. We have applied these criteria in a number of cases where the statute of limitations was at issue. *See, e.g., Hill v. Equitable Trust Co.*, 851 F.2d 691 (3d Cir. 1988), *cert. denied sub nom. Data Controls North, Inc., v. Equitable Bank Nat'l Assoc.*, 109 S.Ct. 791 (1989); *Al-Khazraji v. Saint Francis College*, 784 F.2d 505 (3d Cir. 1986), *aff'd*, 481 U.S. 604 (1987); *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985); *aff'd*, 482 U.S. 656 (1987); *Fitzgerald v. Larson*, 769 F.2d 160 (3d Cir. 1985); *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir.), *cert. denied*, 474 U.S. 950 (1985).

College, 784 F.2d 505, 514 (3d Cir. 1986), *aff'd,* 481 U.S. 604 (1987) (where two of the three *Chevron* factors were present and the third was neutral, decision would be prospectively applied). But, *cf. Smith v. City of Pittsburgh,* 764 F.2d 188, 197 (3d Cir. 1985) (where first factor favored retroactive application and other two factors did not militate against it, decision would be retroactively applied). The party seeking to avoid retroactive application bears the burden of persuasion. *Ackinclose v. Palm Beach County, Fla.,* 845 F.2d 931, 933 (11th Cir. 1988) (citation omitted). *Accord Zemonick v. Consolidation Coal Co.,* 762 F.2d 381, 391 (4th Cir. 1985) (Ervin, J., dissenting), *rev'd on rehearing,* 796 F.2d 1546, *cert. denied,* 479 U.S. 1018 (1986).

Turning then to the first factor, we must ask whether our decision overrules clear past precedent on which the parties may have relied or decides an issue of first impression whose resolution was not clearly foreshadowed. This requires us to examine the state of the law from the time plaintiffs' cause of action arose until they filed their complaint.

Plaintiffs admit that Stephen Juzwin's asbestosis was diagnosed on August 16, 1982, and concede that, in filing their complaint on July 24, 1987, they did not institute suit within the applicable two-year statute of limitations. *Juzwin v. Amtorg Trading Corp.*, No. 87-3876, slip op. at 4 (D.N.J. filed February 28, 1989). The critical period therefore is between August 16, 1982, and July 24, 1987.

The first hint of a commerce clause problem with the New Jersey tolling statute came early in 1982 with the Supreme Court's decision in *G.D. Searle & Co. v. Cohn,* 455 U.S. 404 (1982). The Court, while affirming this court's holding that the statute did not violate the equal protection and due process clauses, vacated

the judgment and remanded for consideration of the commerce clause. Thus, when plaintiffs' cause of action accrued, the tolling statute had been attacked but not struck down.

While *Cohn* was pending on remand in the district court, the New Jersey Supreme Court declared the statute unconstitutional under the commerce clause in mid-1983 and held that its decision was to be applied retroactively.*Coons v. American Honda Motor Co.*, 463 A.2d 921 (N.J. 1983) (*Coons I*), *on rehearing*, 476 A.2d 763 (N.J. 1984) (*Coons II*), *cert. denied*, 469 U.S. 1123 (1985). At this point in time, plaintiffs had lost the protection of any tolling statute, with one year of the two-year limitations period remaining. Nevertheless, they did not file their complaint. In June 1984, just two months before plaintiffs' cause of action would have expired under the two-year statute of limitations, the New Jersey Supreme Court on rehearing held that its decision in *Coons I* was to be applied prospectively. *Coons v. American Honda Motor Co.*, 476 A.2d 763 (N.J. 1984) (*Coons II*), *cert. denied*, 469 U.S. 1123 (1985). The court further stated that the statute of limitations as to foreign, unrepresented corporations would commence to run as of August 3, 1983, the date of *Coons I*. *Id.* at 773. Plaintiffs now had an additional year within which to file suit, yet they did not do so.

In August of 1984, the New Jersey legislature amended the tolling statute in an effort to correct the constitutional infirmity. Plaintiffs once again had a tolling statute to rely on since a duly enacted state or federal law is presumptively valid under the Constitution. *See Cohn*, 784 F.2d at 464.

However, in December of 1984, the district court, while agreeing with the New Jersey Supreme Court that the pre-1984 tolling statute violated the commerce clause, stated that it was

not bound by *Coons II,* since federal, not state, law governs the issue of retroactivity, and held that its decision was to be applied retroactively. *Cohn v. G.D. Searle & Co.,* 598 F.Supp. 965, 969 (D.N.J. 1984), *vacated,* 784 F.2d 460 (3d Cir.), *cert. denied,* 479 U.S. 883 (1986). Once again, plaintiffs' cause of action was in jeopardy since the initial two-year limitations period had expired earlier that year, and it was not clear whether the *Coons II* limitations period was available to them. But, plaintiffs made no apparent effort to file their complaint.

This court reversed the district court in 1986, holding that the decision was to be applied prospectively only. *Cohn,* 784 F.2d at 465. Plaintiffs' claim was revived once more. Still, plaintiffs delayed, allowing an additional year and a half to pass before filing.

Plaintiffs in this case are quite unlike the plaintiffs in *Cohn* (brought suit in state court in 1974 and defendant removed to federal court) and *Coons* (initiated suit in state court in 1978), who relied on a statute with origins dating back to 1820 that had remained unchanged for some 25 years, that had withstood constitutional attack more than 10 years earlier, and that had never been attacked on commerce clause grounds. Here, to the contrary, there was no clear precedent governing the earlier tolling statute upon which plaintiffs might have relied. A commerce clause issue had been raised and remained unresolved at the time their cause of action accrued.

This court has held that when a definitive ruling on the appropriate limitations period was lacking at the time plaintiffs delayed bringing suit, plaintiffs in such cases could not justify the delay. *See Goodman v. Lukens Steel Co.,*777 F.2d 113 (3d Cir. 1985), *aff'd* 482 U.S. 656 (1987); *Fitzgerald v. Larson,* 769

F.2d 160 (3d Cir. 1985); and *Smith v. City of Pittsburgh,* 764 F.2d 188 (3d Cir.), *cert. denied.* 474 U.S. 950 (1985), where we refused to apply the decision in *Wilson v. Garcia,* 471 U.S. 261 (1985), prospectively. *Cf. Al-Khazraji v. Saint Francis College,* 784 F.2d 505 (3d Cir. 1986) *aff'd,* 481 U.S. 604 (1987) (there was clear precedent upon which plaintiff had the right to rely).

Indeed, there was no precedent at all interpreting the new tolling statute on which plaintiffs here ultimately relied. Furthermore, it was a foregone conclusion that there would be a constitutional attack on the amended tolling statute. The question, then, becomes whether our decision in this case was clearly foreshadowed.

The practice that our decision finds impermissible under the commerce clause is tolling the statute of limitations against foreign corporations unrepresented in New Jersey, regardless of whether or not they may be served under the New Jersey long-arm court rule. As early as 1963, nonresident defendants had challenged the New Jersey tolling statute, arguing that its "representation" requirement ought to be interpreted to mean "amenability to service." *See Lemke v. Bailey,* 196 A.2d 523 (N.J. 1963) (statute not unconstitutional on theory it denied equal protection, even though individual nonresident motorist defendants were subject to service of process via Director of Motor Vehicles).

A similar argument was made in terms of New Jersey's long arm court rule and rejected in *Velmohos v. Maren Eng'g Corp.,* 416 A.2d 372 (N.J. 1980), *vacated,* 455 U.S. 985 (1982), where the court held that procedural difficulties in effecting long-arm service supplied a rational basis for different treatment of those amenable to service in New Jersey and those that could only be served outside the jurisdiction. However, it was clear, even then,

that New Jersey's interpretation of its tolling statute placed it with a minority of jurisdictions. As this court noted in *Hopkins v. Kelsey-Hayes, Inc.*, 628 F.2d 801, 807 n.11 (3d Cir. 1980), *vacated sub nom. G.D. Searle & Co., v. Cohn*, 455 U.S. 404 (1982), many other state courts have construed their tolling provisions differently so that out-of-state defendants amenable to long-arm jurisdiction are exempt from the tolling of the statute of limitations.[10] The *Velmohos* court distinguished the New Jersey tolling statute on the basis that the statutes of other states were phrased in terms of "absence" not "representation."

While *Velmohos* resolved the statutory issue regarding the correct interpretation of "representation," it did not resolve the constitutional question which resurfaced in the commerce clause context in a pair of cases, one working its way through the state court system (*Coons*) and one through the federal court system (*Cohn*). The New Jersey Supreme Court struck down the tolling statute in *Coons I* on the grounds that requiring a foreign corporation to obtain a certificate to do business in New Jersey in order to achieve "representation" in the context of the tolling statute constituted an impermissible burden on interstate commerce. It had no need to address the issue of whether requiring a foreign corporation to be served within the jurisdiction to obtain the benefit of the state's limitations statutes violated the commerce clause. Thus, when the New Jersey legislature amended the statute to correct the problem of "how" to achieve "representation," it did not consider the issue of "amenability to service."

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10. *See generally* Annotation, *Tolling of Statute of Limitations During Absence from State as Affected by Fact that Party Claiming Benefit of Limitations Remained Subject to Service During Absence or Nonresidence*, 55 A.L.R.3d 1158 (1974).

Appendix A

When we rejected the equal protection and due process challenges to New Jersey's tolling statute, we were careful to recognize that it was only necessary for the statute to be rationally related to a legitimate government purpose since this constitutional minimum is all that is required for equal protection and due process purposes. *Hopkins,* 628 F.2d at 811. It is well understood, however, that distinctions that suffice for equal protection purposes may be insufficient to withstand commerce clause analysis. *See Bendix,* 486 U.S. at 894. Given the protracted litigation occasioned by this statute, the more than 25-year preoccupation with the issue of "amenability to service" and our carefully worded holding in *Hopkins,* we do not think that our decision here can be termed "superseding legal doctrine that was quite unforeseeable." *See Chevron,* 404 U.S. at 108. Nor are we persuaded that our decision signals an abrupt change in clearly established law, as was the case in *Coons* and *Cohn. Chevron's* first factor, therefore, favors retroactive application.

The second factor under *Chevron* requires us to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 404 U.S. at 106-07. There has been some confusion in the case law as to the term "rule," with some courts interpreting it to mean the underlying constitutional principle and others, the particular decision of the court. Thus, in *Cohn,* the district court focused on the purpose of the commerce clause, "to free interstate commerce from the burdens which might be imposed by the individual states." *Cohn,* 598 F.Supp. at 971. We assumed for the purposes of our argument that the district court had characterized the purpose of the rule correctly. *Cohn,* 784 F.2d at 465. However, we think the better interpretation of the term "rule" is that it refers to the ruling of the court and that the

underlying constitutional principle is the "fulcrum" of the ruling. *See Lemon II,* 411 U.S. at 201.

The purpose of our ruling, then, is to prevent New Jersey from discriminating against out-of-state corporations solely on the basis that they cannot be served within the state. The ruling recognizes the principle that "[o]ne who by law is subject to a state's jurisdiction is effectively present and represented within the state." *Cohn,* 447 F.Supp. at 912 (citations omitted). The effect of our ruling is to ensure that, like New Jersey corporations, foreign corporations that at all times are amenable to service of process under the long-arm rule have the benefit of the state's statutes of limitations. Implementation of our decision will bring New Jersey law into conformity with the rule in the majority of states, that amenability to process by long-arm service renders a tolling statute inapplicable. To give our ruling only prospective effect would retard the purpose of the rule by allowing an entire class of plaintiffs to pursue claims against foreign corporations that the statute of limitations would bar against New Jersey corporations. Thus, we conclude that the second factor favors retroactivity as well.

The final *Chevron* factor involves a balancing of the equities of retroactive application so as to avoid harsh, unjust or inequitable results. "It is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy." *Lemon II,* 411 U.S. at 203 (citations omitted). We have recognized that, in practice, this consideration overlaps with the first factor so that if plaintiffs could have reasonably relied on the tolling statute, it would be inequitable to give retroactive application to a shorter limitations period. *Fitzgerald,* 769 F.2d at 164.

However, in this case, given the precarious constitutional

status of the New Jersey tolling statute, we do not find that plaintiffs' reliance was reasonable. Furthermore, plaintiffs offer no explanation for why they delayed filing during this period of uncertainty. It must be remembered that plaintiffs bear the burden of proof on each factor, and it is not enough merely to argue "unfair!" We are mindful that application of our decision to plaintiffs will deny them the opportunity of obtaining a decision on the merits of their case, but we find that the law was not sufficiently clear for them to have delayed filing.

On the other side of the equation, we find that it would be inequitable to continue to apply a different limitations period out-of-state corporations merely because they could not be served within the state of New Jersey. Defendants raise an additional argument, which we find relevant here, namely, the hardship to third-party defendants if we apply our decision prospectively. The right of a defendant to seek contribution from a joint tortfeasor under N.J. Stat. Ann. § 2A:53A-1, *et seq.* (West 1987), is not affected by the running of the limitations period. Thus, even New Jersey corporations and foreign corporations who have complied with the provisions of the tolling statute would continue to be deprived of the protection of the statute of limitations when they were joint tortfeasors with a nonrepresented foreign corporation.

Where on balance the equities favor retroactive application of our decision, we ought to follow the normal rule that the benefits of a new legal principle should go to the litigant but for whom the issue would not have come to the court's attention. *Cohn,* 784 F.2d at 466. "It is fundamental to our jurisprudence that change in the law, at least in the courts, comes only through the efforts of individual litigants, motivated not by an academic concern for doctrinal correctness but by simple self-interest." *Id.* (citition omitted).

Appendix A

After due consideration of the three *Chevron* factors as applied to the facts of this case, we conclude that our decision invalidating the New Jersey tolling statute on commerce clause grounds should be applied retroactively. Plaintiffs have not established that their reliance on the new tolling statute was reasonable in light of the uncertain state of the law. Thus, application of our decision to their claim would not be inequitable or harsh. Finally, retroactive application will further the purposes underlying our decision.

Accordingly, the order of the district court filed on February 28, 1989, upholding the constitutionality of the New Jersey tolling statute, N.J. Stat. Ann. 2A:14-22, and denying summary judgment, will be reversed with a direction to enter judgment for Carey Canada.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED FEBRUARY 28, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil No. 87-3876

STEPHEN JUZWIN and MARY JUZWIN, his spouse,
Plaintiffs,

v.

AMTORG TRADING CORP., et al.,
Defendants.

and

AMTORG TRADING CORP.,
Defendant-Third
Party Plaintiff,

v.

LEONARD J. BUCK, INC., FLINTKOTE MINES, LTD., NATIONAL GYPSUM COMPANY and TURNER & NEWALL, PLC.,
Third Party
Defendants.

OPINION

SAROKIN, District Judge.

Appendix B

In this asbestos-related products liability action, a host of motions are before the court.

First, the Attorney General for the state of New Jersey moves to intervene in this action for the purpose of defending the constitutionality of the New Jersey tolling statute.

Second, defendants move for summary judgment, arguing that plaintiff's action was not brought within the applicable time period of the statute of limitations and that the statute was not tolled because the New Jersey tolling statute is unconstitutional.

Third, defendant Amtorg Trading Co. moves for summary judgment against plaintiff on the grounds that plaintiff has not sufficiently shown a nexus between Amtorg Trading and plaintiff's injuries, or in the alternative, an order precluding certain evidence as irrelevent.

Fourth, plaintiff moves that the court deem defendant Asbestos Corporation Ltd. ("ACL") to be the successor to Johnson's company and liable for the manufacture and sale of asbestos by Johnson's Company as a sanction for ACL's refusal to answer plaintiff's requests for admissions during discovery on the basis of the Quebec Business Concerns Records Act ("QBCRA"). In a related motion, ACL requests a protective order based on its inability to comply with plaintiff's requests.

Fifth, plaintiff moves that the defendants be precluded from offering evidence of the employer's knowledge of and conduct regarding the health hazards of asbestos.

Sixth, plaintiff moves that the defense of contributory

negligence (and evidence introduced in support of the defense) be barred from this strict liability action.

Seventh, plaintiff requests the entry of an order holding that defendants' asbestos fiber was defective as a matter of law in that it did not contain a warning.

Eighth, plaintiff requests that the court hold that Leonard J. Buck Co. and Amtorg Trading Corp. can be held strictly liable in tort as the distributors of asbestos fiber, and defendant Amtorg Trading Corp. requests that the court hold that it cannot be held strictly liable for its activities as a broker of asbestos.

Ninth, defendants argue that absent expert testimony that a reasonable medical probability exists that a plaintiff will develop cancer due to exposure to asbestos, all testimony and evidence relating to increased risk of cancer should be barred by the court, and that plaintiff should be precluded from recovering for fear of cancer absent expert testimony of clinically diagnosed phobia or evidence of substantial bodily injury as a result of such fear.

All of the above motions were scheduled for oral argument on December 28, 1988. On that date, the court heard argument on the issue of the constitutionality of N.J. Stat. Ann. Sec. 2A:14-22 and postponed any argument on the remaining motions until the court ruled on the motions with respect to N.J. Stat. Ann. Sec. 2A:14-22.

BACKGROUND

Plaintiff Stephen Juzwin is a 68-year-old former employee of Johns-Manville Corp. and of Ruberoid Company who has been diagnosed as having asbestos-related ailments. He alleges that his

condition was caused at least in part by exposure to asbestos fiber during his employment with Johns-Manville for a brief period in approximately 1941 and with Ruberoid from 1948 until 1972. Specifically, plaintiff alleges that he was exposed to raw asbestos fiber supplied by the defendants while mixing various components used in the manufacture of asbestos products and that, as a proximate result, he suffered injury.

The plaintiff admits to being diagnosed as having asbestosis in 1982 and concedes that he did not institute legal proceedings within the applicable two-year statute of limitations.

DISCUSSION

I. Attorney General's Motion to Intervene

Given that an issue of the constitutionality of N.J. Stat. Ann. Section 2A:14-22, the state tolling statute, has been raised by defendants in this action, the motion of the Attorney General to intervene as a defendant pursuant to 28 U.S.C. Section 2403(b), solely for the purposes of defending the constitutionality of N.J. Stat. Ann. Sec. 2A:14-22, is granted.[1]

II. New Jersey's Tolling Statute

Because it is conceded for the purposes of this motion that plaintiff did not institute suit within the two year period of limitations, plaintiff may maintain this action only if the statute of limitations was tolled pursuant to N.J. Stat. Ann. Sec. 2A:14-22. Defendants argue that this action is barred by the New Jersey

1. None of the parties opposed this motion.

statute of limitations because New Jersey's tolling statute acts in violation of the Commerce Clause of the U.S. Constitution. In order to examine the challenge to the New Jersey tolling statute asserted by defendants, it is first necessary to review the history of the statute.

Originally, N.J. Stat. Ann. Sec. 2A:14-22 provided that the limitations period would be tolled for the amount of time that any foreign corporate defendant was not "represented in this state by any person or officer upon whom summons or other original process may be served . . . ." In *Coons v. American Honda Motor Company*, 94 N.J. 307 (1983) ("*Coons I*"), the New Jersey Supreme Court held that the tolling statute violated the Commerce Clause of the U.S. Constitution because the only way for a foreign corporation to gain the "representation" required by N.J. Stat. Ann. Sec. 2A:14-22 was to obtain a certificate of authority to transact business in New Jersey. Such a requirement was held to be a forced licensure, since those corporations which did not obtain a certificate of authority to do business in New Jersey would not receive the benefits of the tolling statute.

In 1984, shortly after the *Coons I* decision, the New Jersey legislature amended N.J. Stat. Ann. Sec. 2A:14-22 to provide:

> . . . A corporation shall be deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process.

This amendment to the tolling statute permits a foreign corporation to designate an agent within New Jersey in order to avoid the tolling of the statute of limitations without being required to obtain a certificate of authority from the Secretary of State. Defendants

now claim that this amendment to the statute was not sufficient to cure the constitutional defect because it forces foreign corporations to choose between indefinite tolling of the statute of limitations or submitting themselves to the general jurisdiction of the courts of New Jersey when the due process requirements for personal jurisdiction may not have been met.

In support of their argument, defendants cite the recent Supreme Court decision of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, ____ U.S. ____ , 108 S.Ct. 2218, 56 U.S.L.W. 4648, No. 87-367, slip op. (June 17, 1988). *Bendix* involved the Ohio tolling statute, which provided that the statute of limitations would be tolled whenever a foreign corporation was not present in the state. To be "present" in Ohio, a corporation was required to appoint an agent for service of process, which by statute would operate as consent to the general jurisdiction of the Ohio courts. The Court held that the statute created an unconstitutional burden on interstate commerce, stating:

> Requiring a foreign corporation to appoint an agent for service in all cases and to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a significant burden.

Slip op. at 5.

Unlike the Ohio statutory scheme, however, the New Jersey statutes regulating corporations do not compel the conclusion that designation of an agent for service of process subjects a foreign corporation to the general jurisdiction of the New Jersey courts. The Court in its *Bendix* opinion explicitly stated that the Ohio

statutory language precluded designation of an agent for service without submitting to the general jurisdiction of the Ohio courts:

> The suggestion that Midwesco had the simple alternatives of designating an agent for service of process in its contract with Bendix or *tendering an agency appointment to the Ohio Secretary of State* is not persuasive. Initially, there is *no statutory support for either option,* and it is speculative that either device would have satisfied the Ohio requirements for the continued running of the limitations period.

Id. at 6 (emphasis added). In contrast, the New Jersey statutory scheme expressly permits tendering an agency appointment to the Secretary of State as a means of preventing the tolling of the statute of limitations. This court concludes that, unlike the Ohio statute, the New Jersey statute does support the possibility of designation by a foreign corporation of a representative for the purposes of preventing the statute of limitations from tolling without at the same time subjecting the corporation to the general jurisdiction of the New Jersey courts.

This court has the power to engage in what has been called "judicial surgery" to enforce a statute and avoid an unconstitutional result through appropriate construction of the statutory language. *See, First Family Mortgage Corp. v. Durham*, 108 N.J. 277, 290 (1987), *app. dism. as moot*, ____ U.S. ____, 108 S.Ct. 2863 (1988). As stated in *Durham*, "The relevant issue in each case is whether the Legislature would want the statute to survive." 108 N.J. at 290. It is clear from the legislature's rapid response to the *Coons I* decision, and from the statement accompanying the New Jersey Senate bill amending Section

2A:14-22,[2] that it would want the statute to survive. The court concludes that the statute as amended supports a reasonable construction which avoids an unconstitutional result. *See, e.g. Johnson v. Robinson*, 415 U.S. 361, 367 (1974); *United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971), *reh. den.*, 403 U.S. 924 (1971).

The New Jersey statute does not on its face require submission to the general jurisdiction of the courts of New Jersey when a representative is named solely for the purposes of avoiding tolling of the statute of limitations pursuant to N.J. Stat. Ann. Sec. 2A:14-22. Even though the tolling statute only applies to foreign corporations, it does not *require* a waiver of a right or privilege, such as the right to challenge the court's in personam jurisdiction in actions unrelated to New Jersey. Rather, the statute is silent on the question.[3] Thus, the court concludes that N.J. Stat. Ann.

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2. The accompanying statement to Senate Bill No. 953, June 18, 1984, stated:

> Senate Bill No. 953 was introduced in response to a recent New Jersey Supreme Court decision, *Coons v. American Honda Co., Inc.*, 94 N.J. 327 [sic] (1983). . . . The filing of a notice designating a representative to accept process is a less burdensome requirement than obtaining a certificate to do business. Therefore, by providing that a foreign corporation would be deemed represented for purposes of N.J. S. 2A:14-22 if such a notice were filed, Senate Bill No. 953 is intended to meet the Supreme Court's objections as stated in the Coons decision and thereby assist New Jersey citizens to pursue their claims against foreign corporations.

3. N.J. Rule 4:4-4(c) provides for *in personam* jurisdiction over a corporation by serving "any person authorized by appointment or by law to

(Cont'd)

Sec. 2A:14-22 is not on its face a burden on interstate commerce and is therefore not a per se violation of the Commerce Clause.

Recognizing that the interests of a corporation in being exempt from the tolling provision are important, *see Bendix*, slip. op. at 5, the court must next determine whether any burden on a foreign corporation caused by compliance with the designation requirement of N.J. Stat. Ann. Sec. 2A:14-22 is greater than the provision's benefit to the state.

A. Extent of Burden on Foreign Corporations

Because the statute does not on its face subject a foreign corporation which has designated an agent pursuant to section 2A:14-22 to the general jurisdiction of the New Jersey courts, the court looks to what burdens such a designation would impose on foreign corporations. Defendants contend, and the court agrees,

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(Cont'd)

receive service of process on behalf of the corporation." Such jurisdiction has been held to extend to the outermost limits of due process, regardless of the extent of any of the corporation's activities in New Jersey. *Avdel Corp. v. Mecure*, 58 N.J. 264 (1971). However, this rule does not contemplate the situation created by N.J. Stat. Ann. 2A:14-22, where designation of an agent is permitted solely for the purpose of avoiding the tolling of the statute of limitations, without requiring a corporation to obtain a certificate to do business in New Jersey. In addition, Rule 4:4-4(c) does not preclude limited designations and is silent with respect to whether general *in personam* jurisdiction could be asserted over a corporation making a limited designation. In this court's view, if the Secretary of State accepts a limited designation and if an agent is authorized to accept service of process only for certain kinds of actions (i.e., actions having a nexus with New Jersey), then the agent would *not* be "authorized by appointment . . . to receive service of process on behalf of the corporation" under Rule 4:4-4(c) with respect to actions having no nexus with the state.

that a foreign corporation, in light of the language of the statute, might reasonably fear that compliance with the designation provision would subject it to the jurisdiction of New Jersey courts in actions unrelated to the state of New Jersey. However, such a fear, even if reasonable, does not necessarily place an unconstitutional burden on interstate commerce. The language of the statute itself does not equate designation of an agent for the purposes of the tolling statute with submission to the general jurisdiction of New Jersey. Although it would not be unreasonable to fear subjection to general jurisdiction as a result of compliance with the statute, the court concludes that it also would not be unreasonable to expect a foreign corporation to make a reasonable inquiry as to the potential consequences of designation of an agent pursuant to N.J. Stat. Ann. Sec. 2A:14-22.

The record before the court shows that, were a corporation to make an inquiry, it would have been informed that the office of the Secretary of State of New Jersey would accept designations filed by foreign corporations which appointed a representative for service of process but conditioned the representation as existing only for causes of action having a nexus with New Jersey.[4] Such

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4. In addition, the Attorney General has cited two recent New Jersey cases which have upheld the validity of N.J. Stat. Ann. Sec. 2A:14-22, and in doing so have interpreted the statute to read that there is no waiver of a foreign corporation's ability to contest service of process or personal jurisdiction when a representative is named for the purposes of meeting the requirements of the tolling statute. *See, Armenti v. Carey Canada*, No. L-45449-87, slip op. at 5 (Law Div. November 7, 1988); *Grossman v. Club Med et al.*, No. L-045449-87, slip op. (Law Div.) (not yet transcribed). The court concludes that it is reasonable to interpret the statute as not requiring foreign corporations to submit to the jurisdiction of New Jersey in cases where there are insufficient contacts with the state for the purposes of personal jurisdiction over the corporation.

a condition is not precluded by the New Jersey statute[5] and avoids the hazard asserted by defendants of exposure to personal jurisdiction with respect to causes of action unrelated to New Jersey activities. In the court's view, corporations making a limited designation for the purposes of preventing tolling of the statute of limitations would only be subjecting themselves to the jurisdiction of New Jersey's courts with respect to actions arising from their activities in New Jersey.[6] A limited designation under the tolling statute places no greater burden on foreign corporations with respect to jurisdiction of the New Jersey courts than those corporations would normally face as a result of their activities in the state. Thus, such a limited designation itself imposes no unconstitutional burden on interstate commerce.

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5. As discussed *supra* at 8-9,n3, N.J. Rule 4:4-4(c) does not preclude a limited designation of an agent for service of process, and it is silent with respect to whether a limited designation would subject a corporation to the general jurisdiction of New Jersey courts. This court has determined that Rule 4:4-4(c) does not require an agent with a limited designation under N.J. Stat. Ann. Sec. 2A:14-22 to accept service of process for actions unrelated to New Jersey.

6. The possibility of designating an agent under Sec. 2A:14-22 and of limiting that agent's authority to accept service of process to suits having a nexus in the state of New Jersey distinguishes the New Jersey statutory scheme from the Ohio statute which was the subject of the *Bendix* opinion. In *Bendix*, the Court noted that there was no statutory authorization for the designation of an agent separate from obtaining a certificate to do business in Ohio, *Bendix*, slip op. at 6, and the Court did not address the issue of whether the filing of a limited designation could avoid the problem of submission to the state's general jurisdiction. The Court's statement that it was "likely" that a designation of an agent for service of process would subject a corporation to the general jurisdiction of the state, *Bendix*, slip op. at 7, was made in the context of a general agency appointment and does not preclude a contrary conclusion by this court in the context of a limited agency appointment.

Appendix B

When the statute is construed to allow designation of a representative without becoming subject to the general jurisdiction of New Jersey, the only burdens placed on a foreign corporation would be the act of making a reasonable inquiry as to the consequences of designation under the statute and the act of designating a representative. The court concludes that the burden of making a reasonable investigation is only a minimal burden. In addition, the mere naming of a representative without being required to register to do business and without becoming subject to the state's general jurisdiction certainly does not rise to the level of a "forced licensure". *See, Coons I*, 94 N.J. at 317 (holding that requirement of representation in order to avoid tolling of limitations period constituted "forced licensure" when only means for acquiring representation was to obtain certificate of authority to do business in New Jersey).

B. Local Benefits of the Tolling Provision

To determine whether the statute violates the Commerce Clause, the court is obligated to balance the minimal burdens on interstate commerce of inquiry and designation with the local purposes of the statute. *See, Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed is clearly excessive in relation the putative local benefits."'); *see also, Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 770-71 (1945).

The state of New Jersey has a legitimate interest in protecting the claims of its resident citizens, and N.J. Stat. Ann. Sec. 2A:14-22 attempts to meet this interest by preventing difficult-

to-locate foreign corporations from asserting the statute of limitations as a defense to suits. *See, e.g., G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982) (recognizing valid state interests served by New Jersey tolling statute). In requiring a foreign corporation to designate a representative solely for the purposes of preventing the tolling of the statute of limitations, the statute does not require a corporation to waive or relinquish any rights or benefits. *Cf., Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 593-4 (1926) (government may not condition receipt of benefits upon nonassertion of constitutional rights). As the court held above, a foreign corporation need not waive its right to contest the jurisdiction of a New Jersey court, since the New Jersey statutory scheme has been interpreted to permit a corporation to file a conditional designation of a representative. Such a designation would serve to limit the corporation's submission to in personam jurisdiction in New Jersey to actions which have a nexus to the state. The court concludes that New Jersey's strong interest in protecting the claims of its resident citizens outweighs whatever minimal burden the designation requirement and the investigation of the potential consequences of such a designation might place on interstate commerce. Thus, the court concludes that N.J. Stat. Ann. Sec. 2A:14-22 does not violate the Commerce Clause of the U.S. Constitution.[7]

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7. The court is aware that the recent opinion of Judge Lifland in *Robinson v. Visual Packaging, Inc., et al.*, No. 86-5059 (D.N.J. January 26, 1989) found that the New Jersey tolling statute places an unreasonable burden on interstate commerce, in violation of the Commerce Clause. The question is clearly a close one; however, this court's opinion diverges from the well-reasoned decision of Judge Lifland in its distinction between the Ohio statutory scheme in *Bendix* and that of New Jersey and in its evaluation of the extent of the burden imposed on interstate commerce by N.J. Stat. Ann. Sec. 2A:14-22.

Appendix B

Because the court concludes that N.J. Stat. Ann. Sec. 2A:14-22 is not unconstitutional, defendants' failure to designate a representative pursuant to that statute served to toll the statute of limitations. Defendants' motion to dismiss based on the statute of limitations is thus denied.

III. Amtorg's Summary Judgment Motion

Amtorg argues that plaintiff simply does not have sufficient evidence to show a nexus between Amtorg and the injuries sustained by plaintiff. Amtorg claims that plaintiff cannot show that he was exposed to any asbestos fiber supplied or brokered by Amtorg, and thus that summary judgment should be entered in favor of Amtorg.

In essence, Amtorg contends that plaintiff's only evidence linking Amtorg to plaintiff's injuries will be general references to the use of "Russian fiber" by employees at Ruberoid during the 1930's through the 1980's; ledger sheets which indicate that Amtorg brokered Russian asbestos fiber to Buck in 1948 but which do not indicate to which Ruberoid plant the asbestos might have been delivered; a brochure published by Amtorg in 1984 which indicates that in 1930, eighty-six percent of all Soviet-American trade was brokered through Amtorg, with no individual reference to asbestos fiber; and two invoices indicating that asbestos was ordered from Amtorg for the South Bound Brook plant but which do not in any way indicate that the asbestos was ever delivered. Amtorg argues that in the absence of *direct* evidence that Amtorg supplied asbestos fiber to the South Bound Brook Ruberoid plant and that plaintiff was exposed to any asbestos fiber supplied by Amtorg, plaintiff cannot recover against Amtorg.

Even though a particular item of evidence might not be

determinative of an ultimate issue to be proven at trial, if it is relevant and not excluded by a rule of evidence, it certainly may be introduced to be considered by the factfinder in combination with other items of evidence. Rule 401 of the Federal Rules of Evidence defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." All of the facts described above meet this test of relevance, and the court cannot conclude as a matter of law that the above facts, taken in combination, are insufficient to allow a jury to find that Amtorg more likely than not was a supplier of asbestos fiber to which the plaintiff was exposed.

The court concludes that summary judgment on this issue would be inappropriate at the present time. Plaintiff need not demonstrate through direct proof that he was exposed to fiber supplied by Amtorg, but such exposure may be proved through circumstantial evidence. Plaintiff has created an issue of fact with respect to Amtorg's supply of asbestos to Ruberoid and plaintiff's exposure to Amtorg's asbestos fiber, and this court cannot conclude at the present stage in the proceedings that plaintiff will be unable as a matter of law to prove its case against Amtorg.

Thus, the court will deny defendant Amtorg's motion for summary judgment and its alternative request to bar testimonial evidence of Russian fiber and introduction of the ledger sheets and Amtorg brochure referred to above.[8] The court does not at

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8. The court notes that plaintiff's opposition to defendant Amtorg's motion for summary judgment was received by counsel for Amtorg on December 23, 1988, and the court did not receive plaintiff's opposition until December 27, (Cont'd)

this time rule on defendant's request for limiting instructions, but will consider during the course of trial any limiting instructions requested by defendants.

IV. Plaintiff's Request For Discovery Sanctions Against ACL

Plaintiff asserts that it has evidence showing that ACL purchased the Johnson's Company's assets and is essentially the successor in interest to the Johnson's Company. Plaintiff served requests for admissions on defendant ACL relating to whether ACL is the successor in interest to Johnson's Co. and the authentication of certain documents it wishes to use at trial. Defendant ACL objected to these requests on the basis of the Quebec Business Concerns Records Act ("QBCRA").[9] Plaintiff now requests sanctions for ACL's refusal to make the requested admissions in the form of admission of plaintiff's documents into evidence and estoppel of ACL from denying its successorship in interest. ACL has cross-moved for a protective order, due to its asserted inability to comply with plaintiff's discovery requests.

The court first notes that the imposition of sanctions on ACL for objecting to requests for admissions when plaintiff has not first complied with the requirements of Fed. R. Civ. P. 36 would be inappropriate. Rule 36 provides:

(Cont'd)

the day before these motions were to be argued and well past the deadline for timely filing of opposition imposed by the General Rules of this court. The court did not consider plaintiff's opposition papers in ruling on this motion.

9. This act essentially prohibits the removal of documents and information characterized as business records from the Province of Quebec, even if production and removal of the documents is ordered by a court.

Appendix B

> The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served.

The court will thus deem plaintiff's request for sanctions as a motion to determine the sufficiency of defendant ACL's objections and will refer the matter to the magistrate for determination.[10]

V. Remaining Motions

The court does not rule at this time on the remaining motions pending before it. Rather, all of the remaining motions still pending before the court[11] will be set down for oral argument on Monday, April 24, 1989, at 2:00 p.m. Any further submissions by the parties with respect to these motions must be received by the court on

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10. As a result, ACL's cross-motion for a protective order will also be resolved by the magistrate.

11. These motions include plaintiff's motion to bar evidence of the employer's knowledge and conduct; plaintiff's motion to bar the defense of contributory negligence; plaintiff's motion for entry of an order holding that defendants' asbestos fiber was defective as a matter of law; plaintiff's request for a holding that Leonard J. Buck Co. and Amtorg Trading Corp. can be held strictly liable in tort as the distributors of asbestos fiber and defendant Amtorg's request for a holding that it cannot be held strictly liable; and defendants' motions regarding increased *risk* of cancer and cancerphobia. *The parties' submissions regarding the constitutionality of punitive damages in this case will be ruled upon by the court without oral argument.*

or before March 29, 1989, and any replies to such submissions must be received no later than April 12, 1989.

CONCLUSION

The motion of the Attorney General for the state of New Jersey to intervene for the purpose of defending the constitutionality of N.J. Stat. Ann. Sec. 2A:14-22 is granted.

Defendants' motion for summary judgment based upon the statute of limitations and the constitutionality of N.J. Stat. Ann. Sec. 2A:14-22 is denied.

Defendant Amtorg's motion for summary judgment, or in the alternative to bar certain evidence as irrelevant, is denied.

Plaintiff's request for discovery sanctions against ACL and ACL's request for a protective order are referred to the magistrate for determination.

The court will hear oral argument on the remaining motions which were originally scheduled for argument on December 28, 1988, on Tuesday, April 24, 1989 at 2:00 p.m.

s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

Date: February 27, 1989
Original to Clerk, U.S. District Court

Copy to:

Hon. Ronald J. Hedges, U.S. Magistrate

Appendix B

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Appendix B

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Attorneys for Defendant, Leonard J. Buck

APPENDIX C — ORDER GRANTING LEAVE TO APPEAL FILED NOVEMBER 7, 1988

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. AM-177-88-T3F
MOTION NO. M-836-88

BEFORE PART: C
JUDGE(S): PETRELLA
SHEBELL
LANDAU

D. ARMENTI, *et ux, et al*

v.

CAREY CANADA, INC., et al

MOTION FILED: OCTOBER 7, 1988

ANSWER(S) FILED:
OCTOBER 24, 1988 BY ATTORNEY GENERAL OF N.J.
OCTOBER 24, 1988 BY: Wilentz, Goldman & Spitzer for Plaintiffs

SUBMITTED TO COURT: OCTOBER 26, 1988

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 4th DAY OF November, 1988, HEREBY ORDERED AS FOLLOWS:

Appendix C

MOTION BY
ASBESTOS CORP., LTD., AND BELL ASBESTOS MINES, LTD., FOR LEAVE TO APPEAL: GRANTED; OTHER

SUPPLEMENTAL:

Leave to appeal is granted. We grant summary disposition on the request of the Attorney General and summarily affirm the September 22, 1985 order for the reasons expressed in the September 16, 1988 oral opinion of Judge Mannion which effectively supplemented the May 27, 1988 oral opinion of Judge Keefe.

[Filed November 7, 1988]

FOR THE COURT:

s/ James J. Petrella
JAMES J. PETRELLA
P.J.A.D.

[Stamped]
I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ R.E. Miller
Acting Clerk

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED MARCH 6, 1989

CARY EDWARDS
Attorney General of New Jersey
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Trenton, New Jersey 08625

By: HARRY HAUSHALTER
Deputy Attorney General
(609) 292-1527

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Honorable H. LEE SAROKIN

Civil Action No. 87-3876 (HLS)

STEPHEN JUZWIN, et al.

Plaintiff,

v.

ASBESTOS CORPORATION, LTD., et al.,

Defendants.

ORDER PERMITTING ATTORNEY GENERAL OF NEW JERSEY TO INTERVENE AS PLAINTIFF

THIS MATTER being opened to the Court on motion to

intervene by the Attorney General of New Jersey on the papers filed and the Court having reviewed the motion papers and being satisfied the 28 *U.S.C.* § 2403(b) permits the Attorney General of New Jersey to intervene in defense of a constitutional challenge to a State statute and further good cause appearing for the entry of this order;

IT IS on this 6th day of March, 1989;

ORDERED that the Attorney General of New Jersey be and hereby is permitted to intervene as a plaintiff in accordance with 28 *U.S.C.* § 2403(b) for the limited purpose of defending the constitutionality of *N.J.S.A.* 2A:14-22.

s/ H. Lee Sarokin
Honorable H. Lee Sarokin
United States District Judge

APPENDIX E — RELEVANT STATUTES

N.J. Stat. Ann. § 2A:14-22:

Nonresidence of person liable

If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter,[1] is not a resident of this State when such cause of action accrues, or removes from this State after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this State, against whom there is such a cause of action, is not represented in this State by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this State or such corporation or corporate surety is not so represented within this State shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

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1. Section 2A:14-16 et seq.

Appendix E

A corporation shall be deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process.

Amended by L.1984, c. 131, § 1, eff. Aug. 23, 1984.

Senate Judiciary Committee Statement

Senate, No. 953—L.1984, c. 131

N.J.S. 2A:14-22 tolls the running of the statute of limitations in civil actions against foreign corporations that are not represented in New Jersey and thus cannot be reached with service of process. This bill would provide that a foreign corporation would be deemed represented in New Jersey for the purpose of N.J.S. 2A:14-22 if the corporation filed with the Secretary of State a notice designating a representative to accept service of process.

The bill was introduced in response to a recent New Jersey Supreme Court decision, Coons v. American Honda Co., Inc., 94 N.J. 327 (1983). In that decision, the court determined that in order to be "represented" in the context of N.J.S. 2A:14-22, a foreign corporation must obtain a certificate to do business in New Jersey. The court ruled that this requirement was in violation of the commerce clause of the U.S. Constitution in that it unduly burdened interstate commerce by requiring a foreign corporation engaged exclusively

in interstate commerce to obtain such a certificate.

The filing of a notice designating a representative to accept process is a less burdensome requirement than obtaining a certificate to do business. Therefore, by providing that a foreign corporation would be deemed represented for purposes of N.J.S. 2A:14-22 if such a notice were filed, S-953 is intended to meet the Supreme Court's objections as stated in the Coons decision and thereby assist New Jersey citizens to pursue their claims against foreign corporations.

N.J. Stat. Ann. 2A:14-1:

6 years

Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.

This section shall not apply to any action for breach of any contract for sale governed by section

Appendix E

12A:2-725 of the New Jersey Statutes.

Amended by L.1961, c. 121, p. 723, § 1, eff. Jan. 1, 1963.

N.J. Stat. Ann. § 2A:14-2:

2 years; actions for injuries to person by wrongful act

Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

N.J. Stat. Ann. § 2A:14-3:

1 year; libel or slander

Every action at law for libel or slander shall be commenced within 1 year next after the publication of the alleged libel or slander.

N.J. Stat. Ann. § 2A:14-4:

Actions on lease, specialty, recognizance or award; 16 years; effect of payments; action on instrument under seal brought by merchant or financial institution; 6 years

Every action at law for rent or arrears of rent, founded upon a lease under seal, every action at

law upon a single or penal bill under seal for the payment of money only, upon an obligation under seal conditioned for the payment of money only, upon a recognizance or upon an award under the hands and seals of arbitrators for the payment of money only shall be commenced within 16 years next after the cause of any such action shall have accrued. If, however, any payment is made on any such lease, specialty, recognizance or award within or after such period of 16 years, an action thereon may be commenced within 16 years next after such payment, and not thereafter.

This section shall not apply to any action for breach of any contract for sale governed by N.J.S. 12A:2-725.

This section shall also not apply to any action founded upon an instrument under seal brought by a merchant or bank, finance company, or other financial institution. Any such action shall be commenced within 6 years next after the cause of any such action shall have accrued.

Amended by L.1961, c. 121, p. 723, § 2, eff. Jan 1, 1963; L.1979, c. 436, § 1, eff. Feb. 14, 1980.

N.J. Stat. Ann. § 2A:14-5:

20 years; judgments

A judgment in any court of record in this state may be revived by proper proceedings or an action

at law may be commenced thereon within 20 years next after the date thereof, but not thereafter. An action may be commenced on a judgment obtained in any other state or country within 20 years next after the date thereof or within the period in which a like action might be brought thereon in that state or country, whichever period is shorter, but not thereafter.

N.J. Stat. Ann. § 2A:14-8:

20 years; actions by state for real estate or rents

No person or body politic or corporate shall be sued or impleaded by the state of New Jersey for any real estate, or for any rents, revenues, issues or profits thereof, except within 20 years next after the right or title thereto or cause of such action shall have accrued.

N.J. Stat. Ann. § 14A:4-1:

Registered office and registered agent

(1) Every corporation organized for any purpose under any general or special law of this State and every foreign corporation authorized to transact business in this State shall continuously maintain a registered office in this State, and a registered agent having a business office identical with such registered office.

(2) The registered office may be, but need not

be, the same as a place of business of the corporation which it serves.

(3) The registered agent may be a natural person of the age of 21 years or more, or a domestic corporation or a foreign corporation authorized to transact business in this State, whether or not any such agent corporation is organized for a purpose or purposes for which a corporation may be organized under this act.

(4) The designation of a principle or registered office in this State and of a registered agent in charge thereof by any corporation of this State or by any foreign corporation authorized to transact business in this State, as in force on the effective date of this act, shall continue with like effect as if made hereunder until changed pursuant to this act.

N.J. Stat. Ann. § 14A:4-2:

Function of registered agent and office; service of process, notice or demand

(1) Every registered agent shall be an agent of the corporation which has appointed him, upon whom process against the corporation may be served.

(2) Whenever any law of this State requires or permits any notice or demand to be given to or made upon a domestic corporation or a foreign

corporation authorized to transact business in this State, its officers or directors, such notice or demand may be sent by mail or otherwise, as the law may require or permit, to the registered office of the corporation in this State, and such notice so given or demand so made shall be sufficient notice or demand.

(3) The provisions of this section shall not exclude any other method provided by law for service of process upon a corporation, domestic or foreign, or for service of a notice or demand upon such corporation, its officers or directors.

(4) Whenever any law of this State requires that any certificate, report or statement made, published, filed or recorded by any corporation, domestic or foreign, state the residence or post office address of any incorporator, shareholder, director or officer, it shall be sufficient if the address of the registered office of the corporation in this State is stated.

N.J. Stat. Ann. § 14A:4-3:

Change of registered office or registered agent

(1) A domestic corporation or a foreign corporation authorized to transact business in this State may change its registered office or its registered agent, or both. When the registered office is changed, or when the registered agent is changed, or dies, resigns or becomes disqualified,

the corporation shall, by resolution of the board, forthwith fix the address of the new registered office or designate the successor registered agent or both, as the case may be.

(2) Such corporation shall forthwith file in the office of the Secretary of State a certificate executed on behalf of the corporation setting forth

(a) the name of the corporation;

(b) if the registered agent is not being changed, the name of the registered agent;

(c) if the registered agent is being changed, the names of the registered agent being succeeded and of the successor registered agent;

(d) if the registered office is not being changed, the address of the then registered office;

(e) if the registered office is being changed, the address of the registered office immediately prior to the change, and the address of the new registered office;

(f) that the address of its registered office and the address of its registered agent will be identical after the change; and

(g) that the change in registered office, or registered agent, or both, is made pursuant to resolution of the board.

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(3) The registered agent of one or more domestic or foreign corporations may change the registered office of such corporation or corporations to another address in the same municipality or county of this State by filing in the office of the Secretary of State a certificate executed by such agent and setting forth

(a) the names of all the corporations whose registered offices are being changed and for which he or it is the registered agent, listed in alphabetical order;

(b) the address of the registered office of each such corporation immediately prior to the change, and the address of the new registered office;

(c) that the address of the registered office of each such corporation and the address of its registered agent will be identical after the change; and

(d) a statement that at least 20 days' prior notice of the change has been given to each such corporation in writing.

The change of the registered office of each of the corporations named in the certificate shall become effective upon the date of such filing or at such later time, not to exceed 30 days after the date of filing, as may be set forth in the certificate.

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N.J. Stat. Ann. § 14A:4-4:

Resignation of registered agent

(1) The registered agent of a domestic corporation or a foreign corporation authorized to transact business in this State may resign by complying with the provisions of this Section.

(2) The registered agent shall serve a notice of resignation by certified mail, return receipt requested, upon the president, or any vice president, or the secretary or treasurer of the corporation at the address last known to the agent, and shall make an affidavit of such service. If such service cannot be made, the affidavit shall so state, and shall state briefly why such service cannot be made. The affidavit, together with a copy of the notice of resignation, shall be filed in the office of the Secretary of State.

(3) Such resignation shall become effective upon the expiration of 30 days after the filing in the office of the Secretary of State of the affidavit under this section or upon the designation by the corporation of a new registered agent pursuant to this act, whichever is earlier. If the corporation fails to designate a new registered agent within said 30-day period, the corporation shall thereafter be deemed to have no registered agent or registered office in this State.

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N.J. Stat. Ann. § 14A:4-5:

Annual report to secretary of state

(1) Every domestic corporation and every foreign corporation authorized to transact business in this State shall file in the office of the Secretary of State, within the time prescribed by this section, an annual report setting forth

(a) the name of the corporation and, in the case of a foreign corporation, the jurisdiction of its incorporation;

(b) the address of the registered office of the corporation in this State, and the name of its registered agent in this State at such address, and, in the case of a foreign corporation, the address of its main business or headquarters office;

(c) the names and addresses of the directors and officers of the corporation; and

(d) the date appointed for the next annual meeting of the shareholders for the election of directors.

(2) Such report shall be filed within 30 days after the time appointed for holding the annual election of directors, commencing with the time appointed for the first annual election of directors following the date of incorporation or of registering to transact business.

(3) If the report is not so filed, the corporation shall, after written demand therefor by the Secretary of State by certified mail addressed to the corporation at the last address appearing of record in his office, forfeit to the State a penalty of $200.00 for each report required to have been filed not more than 5 years prior thereto and remaining unfiled, to be recovered with costs in a civil action prosecuted by the Attorney General. No corporation shall be subject to penalty if it shall, within 30 days after such written demand, file the reports required by law and shall pay to the Secretary of State a fee of $10.00 for the filing of each such report. In lieu of such civil action, the Secretary of State, after expiration of such 30-day period, may issue a certificate to the Clerk of the Superior Court that the corporation is indebted for the payment of such penalty, and thereupon the Clerk shall immediately enter upon his record of docketed judgments the name of such corporation as the judgment debtor, and of the State as the judgment creditor, a statement that the penalty is imposed under this section, the amount of the penalty, and the date of such certificate. Such entry shall have the same force as a judgment docketed in the Superior Court. The Secretary of State within 5 days after such entry shall give notice thereof to the corporation by certified mail addressed to the corporation at the last address appearing of record in his office.

(4) The Secretary of State shall furnish annual report forms, shall keep in his office all such

reports and shall prepare an alphabetical index thereof, which reports and index shall be open to public inspection at proper hours.

Cal. Civ. Proc. Code § 351:

Absence from state; effect on limitation period

EXCEPTION, WHERE DEFENDANT IS OUT OF THE STATE. If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action.

(Enacted 1872.)

Colo. Rev. Stat. § 13-80-118:

Absence or concealment of a party subject to suit

If, when a cause of action accrues against a person, the person is out of this state and not subject to service of process or has concealed himself, the period limited for the commencement of the action by any statute of limitations shall not begin to run until he comes into this state or while he is so concealed. If, after the cause of action accrues, he departs from this state and is not subject to service of process or conceals

himself, the time of his absence while not subject to the service of process or the time of his concealment while not subject to service of process shall not be computed as a part of the period within which the action must be brought.

(Repealed and reenacted Laws 1986, S.B.69, § 1.)

Del. Code Ann., tit. 10, § 8117:

Defendant's absence from State

If at the time when a cause of action accrues against any person, he is out of the State, the action may be commenced, within the time limited therefor in this chapter, after such person comes into the State in such manner that by reasonable diligence, he may be served with process. If, after a cause of action shall have accrued against any person, he departs from and resides or remains out of the State, the time of his absence until he shall have returned into the State in the manner provided in this section, shall not be taken as any part of the time limited for the commencement of the action. (Code 1852, § 2751; 20 Del. Laws, c. 594; 25 Del. Laws, c. 234; Code 1915, § 4680, Code 1935, § 5138; 10 Del. C. 1953, § 8116.)

Hawaii Rev. Stat. § 657-18:

Extension by absence from State

If at any time when any cause of action

in this part or section 663-3 accrues ny person, the person is out of the State, on may be commenced within the terms respectively limited, after the return of the person into the State, and if, after the cause of action has accrued, the person departs from and resides out of the State, the time of the person's absence shall not be deemed or taken as any part of the time limited for the commencement of the action. [CC 1859, § 1041; RL 1925, § 2652; RL 1935, § 3923; R. 1945, § 10434; RL 1955, § 241-17; HRS § 657-18; am L 1972, c 105, § 1(j); am imp L 1984, c 90, § 1]

Hawaii Rev. Stat. § 480-24:

Limitation of actions

Any action to enforce a cause of action arising under this chapter shall be barred unless commenced within four years after the cause of action accrues, except as otherwise provided in section 480-22. For the purpose of this section, a cause of action for a continuing violation is deemed to accrue at any time during the period of the violation. [L 1961, c 190, § 22, Supp, § 205A-22; HRS § 480-24]

Ill. Rev. Stat., Ch. 110, § 13-208:

Absence from State.

§ 13-208. Absence from State. (a) If, when

the cause of action accrues against a person, he or she is out of the state, the action may be commenced within the times herein limited, after his or her coming into or return to the state; and if, after the cause of action accrues, he or she departs from and resides out of the state, the time of his or her absence is no part of the time limited for the commencement of the action.

(b) For purposes of subsection (a) of this Section, no person shall be considered to be out of the State or to have departed from the State or to reside outside of the State during any period when he or she is subject to the jurisdiction of the courts of this State with respect to that cause of action pursuant to Sections 2-208 and 2-209 of this Act, Section 10-301 of "The Illinois Vehicle Code",[1] Section 111 of "The Business Corporation Act",[2] or any other statute authorizing service of process which would subject that person to the jurisdiction of the courts of this State. If a person files an action in a court of this State and attempts to secure service of process upon a defendant pursuant to a statute referred to in the preceding sentence, but does not obtain service of process upon such defendant, such defendant shall not be considered to be subject to the jurisdiction of the courts of this State at the time such action was

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1. Chapter 95½, ¶ 10-301.

2. Chapter 32, ¶ 157.111 (repealed; now ch. 32, ¶ 5.25).

filed, for purposes of the preceding sentence of this section. This subsection (b) of Section 13-208 of this Act shall apply only to actions commenced after October 1, 1973.

P.A. 82-280, § 13-208, eff. July 1, 1982. Amended by P.A. 83-707, § 1, eff. Sept. 23, 1983.

Kan. Stat. Ann. § 60-517:

When defendant out of state.

If when a cause of action accrues against a person he or she be out of the state, or has absconded or concealed himself or herself, the period limited for the commencement of the action shall not begin to run until such person comes into the state, or while he or she is so absconded or concealed, and if after the cause of action accrues he or she depart from the state, or abscond or conceal himself or herself, the time of the absence or concealment shall not be computed as any part of the period within which the action must be brought. This section shall not apply to extend the period of limitation as to any defendant whose whereabouts are known and upon whom service of summons can be effected under the provisions of article 3 of this chapter.

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Md. Cts. and Jud. Proc. Ann. § 5-204:

Denial of defense of limitations to foreign corporations or foreign limited partnerships.

A foreign corporation or foreign limited partnership required by law to qualify or register to do business in the State or a person claiming under the foreign corporation or foreign limited partnership, may not benefit from any statute of limitations in an action at law or suit in equity:

(1) Arising out of a contract made or liability incurred by the foreign corporation or foreign limited partnership while doing business without having qualified or registered; or

(2) Instituted while the foreign corporation or foreign limited partnership is doing intrastate or interstate or foreign business in the State without having qualified or registered. (An. Code 1957, art. 23, § 93; 1973, 1st Sp. Sess., ch. 2, § 1; 1981, ch. 801, § 2.)

Okla. Stat. Ann., tit. 12, § 98:

Absense or flight of defendant — Effect of other laws.

When a cause of action accrues against a person and that person is out of the state or has concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is concealed. If, after a cause of action accrues against a person and that person leaves the state or conceals himself, the time of his absence or

concealment shall not be computed as any part of the period within which the action must be brought. Provided, however, that if any statute which extends the exercise of personal jurisdiction of courts over a person or corporation based upon service outside this state, or based upon substituted service upon an official of this or any other state or nation, or based upon service by publication permits the courts of this state to acquire personal jurisdiction over the person, the period of his absence or concealment shall be computed as part of the period within which the action must be brought.

Wis. Stat. § 180.847:

Transacting business without certificate of authority.

(1) No foreign corporation transacting business or acquiring, holding or disposing of property in this state without a certificate of authority, if a certificate of authority is required under this chapter, shall be permitted to maintain or defend a civil action or special proceeding in any court of this state, until such corporation shall have obtained a certificate of authority. Nor shall a civil action or special proceeding be maintained in any court of this state by any foreign corporation or a successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business or the acquiring, holding or disposing of property by such corporation in this state at a time when such corporation was

without such certificate of authority until a certificate of authority shall have been obtained by such corporation or by a corporation which has acquired all or substantially all of its assets.

(2) The failure of a foreign corporation to obtain a certificate of authority to transact business in this state shall not impair the validity of any contract or act of such corporation or of its title to property in this state.

(3) A foreign corporation which transacts business, acquires, holds or disposes of property in this state without a certificate of authority, if a certificate of authority is required under this chapter, shall be liable to this state, for the years or parts thereof during which it transacted business or acquired, held or disposed of property in this state without a certificate of authority, in an amount equal to all fees and other charges which would have been imposed by this chapter upon such corporation had it duly applied for and received a certificate of authority to transact business in this state as required by this chapter and thereafter filed all reports required by this chapter and in addition thereto it shall be liable for a penalty of 50 per cent of such amount. Such fees and penalty shall be paid before a certificate of authority is issued.

(4) A foreign corporation transacting business or acquiring, holding or disposing of property in this state without a certificate of authority, if a

certificate of authority is required under this chapter, shall by so doing be deemed to have thereby appointed the secretary of state as its agent and representative upon whom any process, notice of demand may be served in any action or proceeding arising out of or relating to any business so transacted, or property acquired, held or disposed of within this state. Service of such process notice or demand shall be made by serving a copy upon the secretary of state or by filing such copy in his office, and such service shall be sufficient service upon said foreign corporation, provided that notice of such service and a copy of the process, notice or demand are within 10 days thereafter sent by mail by the plaintiff to the defendant at its last known address, and that the plaintiff's affidavit of compliance herewith is appended to the process, notice or demand. The secretary of state shall keep a record of all such processes, notices and demands which shows the day and hour of service.

(5) Nothing herein contained shall limit or effect the right to serve any process, notice or demand required or permitted by law to be served upon a foreign corporation in any other manner now or hereafter permitted by law.

Appendix E

28 U.S.C. § 1292:

Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which

there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 49, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Sept. 2, 1958, Pub.L. 85-919, 72 Stat. 1770.

APPENDIX F — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5420

STEPHEN JUZWIN and MARY JUZWIN, his wife
V.
ASBESTOS CORPORATION LTD., et al.

CAREY CANADA, INC., *Appellant*

(D.C. Civil No. 87-3876)

PRESENT: HIGGINBOTHAM, *Chief Judge,* SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, *Circuit Judges,* and SEITZ, *Senior Circuit Judge.**

The petition for rehearing filed by appellee having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT,

s/ Becker
Circuit Judge

DATED: May 9, 1990

* As to panel rehearing only.

90-761

FILED
AUG 9 1990
JOSEPH F. SPANIOL, JR
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STEPHEN JUZWIN and MARY JUZWIN, his wife,
Petitioners,

vs.

ASBESTOS CORPORATION LTD., individually and as successor to Johnson's Company; CAREY CANADIAN MINES; AMTORG TRADING CORPORATION; and METROPOLITAN LIFE INSURANCE COMPANY; FLINTKOTE MINES, LTD.; TURNER & NEWALL, P.L.C.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COUPT OF APPEALS FOR THE THIRD CIRCUIT

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Martin G. Picillo
Of Counsel and on
The Brief

QUESTIONS PRESENTED

1. Does the Commerce Clause of the United States Constitution prohibit a state from withholding a statute of limitations defense from corporate defendants who have failed to appoint an agent for service of process where such appointment, according to state and federal courts, subjects the corporation to the general jurisdiction of the state courts?

2. If the Commerce Clause does prohibit such a tolling provision, should plaintiffs, who filed suit prior to the Court of Appeals' invalidation of the state statute be subjected to a statute of limitations defense?

LIST OF PARTIES

The parties to the proceedings in the courts below were as follows:

Stephen Juzwin and Mary Juzwin (plaintiff-appellee below);

Asbestos Corporation Ltd. (defendant below);

Carey Canadian Mines (defendant-appellant/third-party plaintiff below);

Amtorg Trading Corporation (defendant/third-party plaintiff below);

Metropolitan Life Insurance Company (defendant below);

Flintkote Mines Ltd. (defendant/third-party defendant below);

Turner & Newall, P.L.C. (defendant/third-party defendant below);

Leonard J. Buck, Inc. (appellee/third-party defendant/ fourth-party plaintiff below);

National Gypsum Company (third-party defendant below);

Lac D'Amiante du Quebec Limitee (third-party defendant below);

Bell Asbestos Mines Ltd. (third-party defendant below);

Associated Ore & Metal Corp., Ltd. (fourth-party defendant below);

Attorney General of New Jersey (plaintiff-intervenor below);

Wilentz, Goldman & Spitzer (Amicus Curiae below).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STEPHEN JUZWIN and MARY JUZWIN, his wife,

Petitioners,

vs.

ASBESTOS CORPORATION LTD., individually and as successor to Johnson's Company; CAREY CANADIAN MINES; AMTORG TRADING CORPORATION; and METROPOLITAN LIFE INSURANCE COMPANY; FLINTKOTE MINES, LTD.; TURNER & NEWALL, P.L.C.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF THE CASE

This is a personal injury action in which petitioners, Mary and Stephen Juzwin allege that Stephen was exposed to

asbestos products or asbestos fiber supplied by the defendants, including Amtorg Trading Corporation.

Defendant, Amtorg, a New York corporation, accepted service at its New York office by certified mail and subsequently removed the case to federal court pursuant to 28 U.S.C. 1446. All of the defendants in this action are foreign corporate entities.

Petitioner admits to being diagnosed as having asbestosis in 1982 and failed to institute a law suit within two years thereafter. Discovery showed that in June, 1982 petitioner, represented by counsel, filed and litigated a Worker's Compensation claim. No lawsuit was timely filed by the petitioners.

Under the N.J.S.A. 2A:14-2, the New Jersey statute of limitations for personal injury actions the case was time-barred. However, the operation of N.J.S.A. 2A:14-22, the New Jersey tolling statute, prevented the running of the limitations period for foreign corporations not represented in New Jersey.

The district court denied Amtorg's motion for dismissal based on the time-bar and rejected their contention that the tolling statute imposed an impermissible burden on interstate commerce. However, they certified the question to the Court of Appeals for the Third Circuit.

The third circuit held that the New Jersey tolling statute was invalid as applied against foreign corporations and the question was controlled by this Court's recent decision in *Bendix Autolite Corp v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988). The ruling given retroactive application.

Until *Juzwin* v. *Asbestos Corp., Ltd., et.al*, 900 F. 2d 686(1990), the law was in constant flux, repeatedly questioned and twice stricken as unconstitutional. Further, Amtorg, since 1984 has been involved in asbestos litigation with the present petitioner's counsel and Amtorg has always

accepted service of process by certified mail at its New York City office.

It is for these reasons, as discussed infra, that Amtorg submits that N.J.S.A. 2A:14-22 imposes an unconstitutional burden on interstate commerce such that the statute must be invalidated. If this Court finds that the statute is unconstitutional Amtorg submits that such a ruling must be applied to the parties at bar. Controlling precedent focuses inquiry on whether petitioner justifiably relied upon prior law. Petitioners here, can in no way be said to have justifiably relied on the statute's validity. It is therefore appropriate to apply a ruling of unconstitutionality retroactively.

I. THE LOWER COURT'S DETERMINATION THAT THE SAVING CONSTRUCTION GIVEN TO THE TOLLING STATUTE BY THE NEW JERSEY LEGISLATURE IS UNCONSTITUTIONAL HAS BEEN UPHELD BY THE NEW JERSEY COURTS.

The Third Circuit Court of Appeals in *Juzwin v. Asbestos Corporation, Ltd.*, 900 F. 2d 686 (1990), held that the New Jersey tolling statute is unconstitutional as applied by New Jersey against foreign corporations. The panel, basing its decision upon how the New Jersey Supreme Court would decide the issue, relied upon this Court's decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 100 L.Ed 2d 896 (1988) and determined that the New Jersey tolling statute, incorporating the legislative changes made in 1984, still constituted an impermissible burden on interstate commerce.

The third circuit court did not have the benefit of any binding precedents from the New Jersey state courts when it rendered the decision. However, since that decision was handed down, a New Jersey trial court opinion has been approved for publication and is now binding law in New Jersey, *Crespo v. Stapf*, W-028242-88 (March 21, 1990). In that case the Superior Court of New Jersey, Hudson County relied upon both *Bendix* and *Coons* v. *American Honda*

Motor Co., 94 N.J. 307 (1983) and declared the New Jersey tolling statute unconstitutional.

In *Crespo v. Stapf,* defendant, Joseph Stapf, a resident of Germany and owner of an unincorporated business, located in Germany, sought to dismiss plaintiff's product liability action on the grounds that New Jersey's tolling statute was unconstitutional against non-resident individuals. Judge Wefing stated that a "sensitive balancing between the state's legitimate interest in preserving New Jersey citizens' causes of action and any resultant burden which flows from the method selected" is required. *Crespo* at page 5. "Under the statute, the only method by which a nonresident individual may receive the protection of our statute of limitations is to become a resident of this state. *In dicta*, the New Jersey Supreme Court has indicated that an attempt to require a foreign corporation to obtain a certificate to do business to obtain the benefits of the statute of limitations would not survive a balancing analysis for commerce clause purposes", citing *Coons. Id.* at 6. A state "may not condition this exercise of the defense of the statute of limitations on the . . . relinquishment of rights that the foreign . . . (defendant) would otherwise retain," citing *Bendix.*" *Id.*

Petitioners have failed to call the *Crespo* case to the Court's attention, but rather, they argue that *Armenti v. Carey Canada, Inc.* Doc. No. AM-177-88-T3F (Nov. 4, 1988) an unpublished opinion, is controlling in New Jersey. N.J. Rule 1:36-3 in pertinent part states "[n]o unpublished opinion shall constitute precedent or be binding upon any court."

Armenti is an unpublished decision and as such is not binding law in New Jersey. Petitioner's reliance on *Armenti* in determining that the New Jersey court's construction of the tolling statute is in conflict with the lower court's holding is erroneous. The lower court and the state courts are in agreement that what petitioner calls "the saving construction" given to the tolling statute by the New Jersey state legislature

is invalid as applied and contrary to the Commerce Clause of the United States Constitution Art. I § 8.

II. THE LOWER COURT APPLIED THIS COURT'S PRECEDENTS IN DECIDING THE TOLLING STATUTE UNCONSTITUTIONAL AS APPLIED BY NEW JERSEY AGAINST FOREIGN CORPORATIONS.

In deciding *Juzwin* the lower court did not depart from this Court's analysis in *Bendix* in order to determine that the New Jersey tolling statute is unconstitutional as applied in this state. The court examined the tolling statute under both the heightened scrutiny standard as set out in *Ford Motor Co. v. Insurance Comm'r of Pa.*, 874 F2d 926, (3d Cir. 1989) and the balancing test enunciated in *Pike v. Bruce Church, Inc.* 397 U.S. 137 (1970). "While heightened scrutiny is the standard of review for simple economic protectionism, '[this] category of protectionism includes those state measures that discriminate on their face against out-of-state interests or in favor of in-state interests." "Because the New Jersey tolling statute applies to out-of-state corporations but not to New Jersey corporations, it comes within the class of statutes that are subject to heightened scrutiny.' " *Juzwin* v. *Asbestos Corp., Ltd.* at page 8.

The court determined that a more narrowly tailored statute could be effected by the state where a court might order the statute of limitations to be tolled when it is satisfied that, "in spite of diligent efforts, long-arm service cannot be effectuated either because the corporation is beyond the reach of the long-arm rule or because it cannot be found for mailservice." In that way, "the differentiation would be based on the inability to locate or reach, [a particular foreign defendant] not on the attribute of being foreign." See *Bendix* 486 U.S. at 898.

The lower court recognized the difficulty in drawing the line between a statute that "is virtually *per se* invalid and one

that must be analyzed under the balancing test" and found, as in *Bendix,* that the selection of the test "is not outcome-determinative, for even under the balancing test the statute cannot survive. *Juzwin* at 11. They stated that the real burden, "that foreign corporations unrepresented but possibly amenable to long-arm service must make the difficult choice whether to file designations (with uncertain consequences) or forego a potential limitations defense is 'grossly disproportionate to the state's interest in assisting resident plaintiffs in pursuit of claims against foreign corporations.' " *Id.* Therefore, "even with [the] limiting construction of N.J. Stat. Ann Sec. 2A:14-22, the tolling statute violated the commerce clause under either test since a nondiscriminatory procedure, less burdensome to interstate commerce, could be adopted by New Jersey" under the state long-arm statute N.J. Ct. R. 4:4-4(c)(1). *Id.* at 10.

In addition, plaintiffs in New Jersey can avail themselves of N.J. Ct. R. 4:26-4 providing in pertinent part: "If the defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient to identify him." *Id.* at 9. This "John Doe complaint" permits New Jersey plaintiffs to toll the statute of limitations when they can not locate foreign corporate defendants. Petitioners are absolutely incorrect in asserting that the decision of the lower court was a misapplication of Supreme Court precedents.

Petitioners also argue that twelve other states have tolling statutes and the decision in *Juzwin* will have enormous consequences on what happens to those states. This Court was mindful of that when it rendered the decision in *Bendix* and therefore this contention is unrelated to the case at hand. *Juzwin* and *Crespo,* following the analysis in *Bendix,* deal exclusively with the unconstitutionality of New Jersey's tolling statute and its legislative limitations. These two cases are

in accord with each other and their interpretation is not confusing nor does it disagree with this Courts previous application of the commerce clause to state tolling statutes.

III. THE LOWER COURT'S RETROACTIVE APPLICATION OF ITS HOLDING IS CONSISTENT WITH THIS COURT'S RETROACTIVITY GUIDELINES.

Certiorari on the issue of retroactivity should not be granted as the third circuit court's decision to grant retroactivity was based upon this Court's decision in *Chevron Oil Co. v. Huron,* 404 U.S. 97 (1971), was fact sensitive, and was not an abuse of discretion. Petitioner argues that the lower courts decision to apply the statute retroactively was based upon no finding of facts by the district court that petitioners should have foreseen the constitutional infirmities of the statute. To the contrary, the third circuit when it declared that the question must be decided according to *Chevron* standards "what is necessary, what is fair, and what is workable", citing *Lemon II.* 411 U.S. at 200, decided that plaintiff's reliance on the constitutionality of the New Jersey tolling statute was unreasonable.

Examining the law of New Jersey from the time plaintiff's cause of action arose until they filed their complaint five years later, the court determined that plaintiffs not only had notice that the tolling statute had been attacked and then struck down, *G.D. Searle & Co. v. Cohn,* 455 U.S. 404 (1982) followed by *Coons v. American Honda Motor Co.,* 463 A. 2d 921 (N.J. 1983) (*Coons I*), *on rehearing,* 476 A2d 763 (N.J. 1984) (*Coons II*), *Cert. denied.* 469 U.S. 1123 (1985), but in addition they were aware of the prospective and retroactive arguments that occurred after the New Jersey legislature attempted to correct the constitutional infirmity. See *Juzwin,* pagesx 17-19.

Plaintiffs did not attempt to file their complaint on any number of occasions although, "it was a foregone conclusion

that there would be a constitutional attack on the amended tolling statute." *Id.* at 19. "In cases where a definitive ruling is lacking on the appropriate limitations period plaintiffs can not justify delaying bringing suit." *Id.* at 19.

Petitioners are seeking a writ based upon their failure to timely file the complaint in this matter. This is not an adequate reason to grant certiorari, and is not the type of case the Supreme Court should hear on certiorari. Petitioners are unhappy with the third circuit's reading and analysis of *Bendix*. However, the only legal basis cited in their petitions is *Armenti* an unpublished and non-binding opinion. *Crespo v. Stapf,* approved for publication in June 1990, affirmed the unconstitutionality of the tolling statute and is controlling in New Jersey.

IV. THE CRITERIA FOR GRANTING A WRIT OF CERTIORARI HAVE NOT BEEN MET PURSUANT TO SUPREME COURT RULES, RULE 17.

According to Supreme Court Rules, Rule 17, a writ of certiorari should not be granted to petitioners because no federal court of appeals has decided a federal question in a way in conflict with a state court of last resort or has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such departure by a lower court to call for an exercise of Supreme Court power of supervision. In addition, no state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals, nor has any state court or a federal court of appeals decided an important question of federal law which has not been, but should be, settled by the Supreme Court, or has decided a federal question in a way in conflict with applicable decision of the Supreme Court.

CONCLUSION

In conclusion the writ of certiorari should not be granted. Plaintiffs have failed to meet the criteria, and have cited no law to the Court which would indicate that the New Jersey courts would differ with the third circuit court's decision in this case.

Respectfully submitted
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Amtorg Trading Corporation

No. 90-76

(3)

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STEPHEN JUZWIN, *et ux.*,

Petitioners,

—v.—

ASBESTOS CORPORATION, LTD., *etc.*, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CAREY CANADA, INC.

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PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to the proceeding below included:

1) Carey Canada, Inc. (defendant-appellant below) [incorrectly listed in the petition as "Carey Canadian Mines];
2) Stephen Juzwin and Mary Juzwin, his wife (plaintiffs-appellees below);
3) The State of New Jersey (intervenor below);
4) Amtorg Trading Corp. (defendant-appellee below);
5) Asbestos Corp., Ltd. (defendant-appellee below);
6) Bell Asbestos Mines, Ltd. (defendant-appellee below);
7) Flintkote Mines, Ltd. (defendant-appellee below);
8) Metropolitan Life Insurance Co. (defendant-appellee below);
9) Leonard J. Buck, Inc. (third-party defendant-appellee below).
10) Wilentz, Goldman & Spitzer, P.C. (counsel for *amicus curiae* below).

Four corporations listed in the petition were parties to the proceedings in the district court, but were not parties to the proceedings in the court of appeals: a) Turner & Newall, P.L.C. (third-party defendant), b) National Gypsum Co. (third-party defendant), c) Lac D'Amiante du Quebec Limitee (defendant), d) Associated Ore & Metal Corp., Ltd. (fourth-party defendant).

Pursuant to Rule 29.1 respondent Carey Canada, Inc. states that its parent company is The Celotex Corporation. (The Celotex Corporation's parent is Jim Walter Corporation). Respondent has no affiliates or other than wholly owned subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-76

STEPHEN JUZWIN, *et ux.*, *Petitioners,*

—v.—

ASBESTOS CORPORATION, LTD., *etc.*, *et al.*, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CAREY CANADA, INC.

Respondent Carey Canada, Inc. [hereinafter "Carey Canada"] respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Third Circuit's decision in this matter.

OPINIONS BELOW

Although the petition correctly notes the citation for the court of appeals' reported decision below, this respondent wishes to add that the district court opinion it reversed is not published and bears a different caption: *Juzwin v. Amtorg Trading Corp.*, Civil No. 87-3876, slip op. (D.N.J. opinion filed February 28, 1989) (reprinted in the appendix to the

petition[1] at 27a). Two other district court opinions in the case were published, but they concern issues unrelated to those raised in the petition.[2]

COUNTERSTATEMENT OF THE CASE

A. Preliminary Statement

This case involves the constitutionality of the New Jersey "tolling statute," N.J. Stat. Ann. § 2A:14-22 (West 1987),[3] which provides, *inter alia*, that the statute of limitations applicable to a plaintiff's claim will toll—that is, cease to run—as to a defendant foreign corporation (not organized under the laws of New Jersey) during the time it is not "represented" within the state. For purposes of the tolling statute, a foreign corporation not "represented" within the jurisdiction "by any person or officer upon whom summons or other original process may be served," will be "deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process." N.J. Stat. Ann § 2A:14-22. Since respondent Carey Canada was "formed under the laws of Canada, has no corporate offices in the

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1 Hereinafter citations to the appendix to the petition will be stated as: "Pet. App. _____a"; citations to the petition itself will be stated as: "Pet. _____."

2 The petition addresses the validity of the New Jersey "tolling statute" under the Commerce Clause of the United States Constitution; the two published district court opinions concern the constitutionality of punitive damages: *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053 (D.N.J. 1989), *vacated on reconsideration*, 718 F. Supp. 1233 (D.N.J. 1989). Unfortunately, in preparing the reported version of the Third Circuit opinion below striking the New Jersey tolling statute on commerce clause grounds, West Publishing Co. erroneously replaced citations to the district court's unpublished tolling statute opinion with citations to one of the district court's reported punitive damages opinions. See *Juzwin v. Asbestos Corp., Ltd.*, 900 F.2d 686, 688 (3d Cir. 1990) (citing 705 F. Supp. 1053, 1055).

3 Pet. App. 6a. Hereinafter cited without parenthetical reference to publisher and date.

state of New Jersey, has never been registered to do business there, and has not appointed an agent for service of process with the Secretary of State . . . it is not 'represented' in New Jersey within the meaning of the tolling statute." *Juzwin v. Asbestos Corp., Ltd.*, 900 F.2d 686, 688 (3d Cir. 1990). Pet. App. 7a. It is this provision regarding designation of an agent to accept service of process[4] which presented the issue litigated below.

The relevant provision of the tolling statute was added to the "current" tolling statute[5] in 1984 in an attempt to cure a constitutional defect responsible for the predecessor statute's invalidation by both state[6] and federal courts.[7]

B. The Facts

On or about July 24, 1987, petitioners Stephen Juzwin and Mary Juzwin, his wife, filed an action in the Law Division of the Superior Court of New Jersey alleging that Stephen

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4 "A corporation shall be deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process." Pet. App. 6a.

5 Except for the addition of the relevant provision set forth in the preceding note *supra*, the "current" tolling statute stricken by the decision below is identical to the "predecessor" tolling statute.

6 In *Coons v. American Honda Motor Co.*, 94 N.J. 307, 463 A.2d 921 (1983) [hereinafter "*Coons I*"], *modified*, 96 N.J. 419, 476 A.2d 763 (1984) [hereinafter "*Coons II*"], *cert. denied*, 469 U.S. 1123 (1985), the New Jersey Supreme Court held that by requiring a foreign corporation to obtain a "certificate of authority" to do business in New Jersey in order to achieve "representation" and realize the benefits of the statute of limitations, the predecessor tolling statute amounted to a "forced licensure provision" which unconstitutionally burdened interstate commerce. *Id.* at 318, 463 A.2d at 927. In *Coons II* the court held that its *Coons I* ruling should be applied prospectively. [Hereinafter, where appropriate, the *Coons* opinions will be cited without subsequent history].

7 *Cohn v. G.D. Searle & Co.*, 598 F. Supp. 965 (D.N.J. 1984) (striking statute on commerce clause grounds and applying decision retroactively), *reversed in part and remanded*, 784 F.2d 460 (3d Cir.) (requiring prospective application), *cert. denied*, 479 U.S. 883 (1986). [Hereinafter, where appropriate, opinions in the *Cohn* line of decisions from 1978 to 1986 will be cited without subsequent history].

Juzwin [hereinafter "Juzwin"] developed a pulmonary condition as a result of his exposure to various asbestos-containing products manufactured or supplied by the defendants. Among the defendants named in the complaint was respondent Carey Canada, a corporation organized under the laws of Canada.

Upon application of defendant Amtorg Trading Corporation, the action was removed to the United States District Court for the District of New Jersey, where jurisdiction was based upon diversity of citizenship.[8]

During the course of discovery, plaintiffs supplied answers to interrogatories admitting that Juzwin knew that he had been diagnosed as having an asbestos-related condition on or about August 16, 1982.[9] Moreover, on June 7, 1982—several months before he learned of that diagnosis—Juzwin, represented by counsel, filed a Workers Compensation action for the same type of condition at issue in the instant case and subsequently collected benefits.[10] Since plaintiffs' action was not filed within two years of his diagnosis as required by the applicable statute of limitations governing personal injury claims, N.J. Stat. Ann. § 2A:14-2 (West 1987), defendant Carey Canada moved for dismissal of plaintiffs' complaint on that ground, arguing that the New Jersey tolling statute was invalid under the Commerce Clause of the United States Constitution and therefore could not operate to toll the run-

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8 To assist the Court and petitioner with respect to Rule 14.1(i), Carey Canada notes that jurisdiction in the district court was predicated upon diversity of citizenship pursuant to 28 U.S.C. § 1441(a) and 28 U.S.C. § 1332(c). The amount in controversy was alleged to exceed $10,000.

9 See Joint Appendix in *Juzwin v. Asbestos Corp., Ltd.*, 900 F.2d. 686 (3d Cir. 1990) at pages 11 and 16c. [Hereinafter citations to the Joint Appendix before the Third Circuit will be stated as "Jt. App. _____"]. See also the opinion of the district court below at Pet. App. 29a-30a.

10 See Plaintiffs' Answers to Part I Interrogatories, response to I.27 attaching "Employee's Claim Petition," No. 82-16872 (filed June 2, 1982 with the Division of Workers Compensation, Department of Labor and Industry, State of New Jersey), as well as two "Order[s] Approving Settlement With Dismissal." (Discussed in Carey Canada's opening brief to the Third Circuit at page 6).

ning of the limitations period. Carey Canada also requested that the decision striking the tolling statute be applied retroactively. Pet. App. 28a; Jt. App. at 16.

Although Carey Canada, a Canadian corporation, has been joined as a defendant in numerous federal and state actions in New Jersey over the past eight or more years, it is not "represented" in the jurisdiction for tolling statute purposes. See Preliminary Statement *supra*. Furthermore, since Carey Canada sold its asbestos fiber "F.O.B. Quebec, Canada,"[11] it did not conduct its business operations in the United States.

The district court upheld the constitutionality of the tolling statute, denied Carey Canada's motion, and certified the tolling statute issue for interlocutory appeal under 28 U.S.C. § 1292(b). The Third Circuit granted Carey Canada permission to appeal and reversed, holding that the tolling statute impermissibly burdened interstate commerce. Furthermore, the Third Circuit, speaking through the Honorable Collins J. Seitz, C.J., held that its decision striking the tolling statute should be retroactively applied. *Juzwin*, 900 F.2d 686, 696 (3d Cir. 1990). Pet. App. 1a, 26a.

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11 Carey Canada's Answers to Interrogatories at A.4. (Discussed in Carey Canada's opening brief to the Third Circuit at 7). A "Free on Board" point of origin contract requires the seller to put his goods in the possession of the carrier at that location. See U.C.C. §§ 2-319 and 2-504.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE THIRD CIRCUIT DOES NOT CONFLICT WITH THE LAW OF NEW JERSEY AND THE NEW JERSEY APPELLATE COURTS ARE CURRENTLY CONSIDERING WHETHER TO FOLLOW THAT DECISION

A. New Jersey Law Does Not Provide for the "Saving Construction" of the Tolling Statute Urged by Petitioners

One of the principal arguments advanced by petitioners for grant of certiorari in the case at bar is that the Third Circuit disregarded a "saving construction" of the tolling statute adopted by New Jersey state courts. See, e.g., Pet. at 4, 6, 7, 12, 13, 14 and 24. In support of this argument, petitioners cite the unpublished summary affirmance of the New Jersey Superior Court, Appellate Division in *Armenti v. Carey Canada, Inc.*,[12] and a district court opinion, *Cutler v. Raymark Industries, Inc.*, 707 F. Supp. 168 (D.N.J. 1989), which was overruled[13] by the Third Circuit decision at bar.

Contrary to petitioners' assertions, neither the bench opinions rendered by Law Division Judges Keefe and Mannion,[14] nor the order of the Appellate Division (Pet. App. 47a) constitutes precedent "binding upon any court" since those deci-

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12 *Armenti v. Carey Canada, Inc.*, No. L-045449-87 (N.J. Super. Ct. Law Div. Middlesex County), *aff'd without opinion*, No. 177-88T3F (N.J. Super. Ct. App. Div. order filed Nov. 7, 1988).

13 In *Cutler*, the district court upheld the same tolling provision at bar in *Juzwin* against a commerce clause challenge.

14 The two bench opinions are reprinted in the appendix to this brief at 1a and 23a, respectively. [Hereinafter citations to the appendix to this brief will be stated as: "Brief App."].

sions were not approved for publication pursuant to N.J. Court R. 1:36-3.[15]

Furthermore, this respondent respectfully maintains the decisions in *Armenti* cannot serve even as persuasive authority regarding the statutory construction and commerce clause issues raised by petitioner. Both the initial trial court bench opinion, rendered before this Court's decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), and the second trial court bench opinion rendered thereafter pursuant to defendants' motion for rehearing, are marred by erroneous interpretations of significant issues.[16] The Appellate Division's order in *Armenti* cannot serve as a greater source of persuasive authority since it "summarily affirm[s] the Law Division's ruling "for the reasons expressed in the September 16, 1988 oral opinion of Judge Mannion which effectively supplemented the May 27, 1988 oral opinion of Judge Keefe." Pet. App. 47a.

A review of petitioners' other arguments in support of the "saving construction" reveals the weakness of their position. As in the proceedings below, petitioners maintain that the New Jersey tolling statute is valid since, unlike the Ohio tolling provision invalidated by this Court's decision in *Bendix*, 486 U.S. 888 (1988), the New Jersey enactment permits out-of-state corporations not registered to do business in New Jersey to obtain the protection of the statute of limitations by

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15 That rule provides: "No unpublished opinion shall constitute precedent or be binding upon any court. Except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless all other parties are served with a copy of the opinion and of all other relevant unpublished opinions known to counsel including those adverse to the position of his client." *Id.*

16 For example, Judge Keefe stated that the enactment did not unduly burden interstate commerce on the theory that since it pertains to both individuals and corporations it is "not aimed simply at commerce conduct." Brief App. 19a. Regarding Judge Mannion's bench opinion, this respondent respectfully maintains that undue weight was given to the New Jersey legislature's perceived desire to create a constitutional statute. See Brief App. at 39a.

designating a representative for service of process whose authority is limited to causes of action as to which the corporation has a "nexus" with New Jersey, *i.e.*, the minimum contacts necessary for *in personam* jurisdiction under the Due Process Clause of the Fourteenth Amendment. See, e.g., Pet. at 5.

Although nothing in the wording of the New Jersey tolling statute suggests that it permits the appointment of an agent for service of process whose authority is limited to minimum contact causes of action,[17] proponents of the statute in the proceedings below argued that the absence of language prohibiting such appointments permitted the federal courts to perform "judicial surgery" and read in such a provision. The argument that a judicial interpretation of the New Jersey tolling statute may ignore the plain meaning of the enactment to avoid an unconstitutional result conflicts with the sound legal principle that a court cannot substitute its judgment for that of the legislature by rewriting a statute.[18]

Petitioners' limited designation argument is also undercut by New Jersey decisional law that designation of an agent to accept service of process subjects a corporation to the general jurisdiction of the forum.[19]

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17 The statute flatly states that: "A corporation shall be deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process." N.J. Stat. Ann. § 2A:14-22.

18 *See, e.g., Badaracco v. Commissioner*, 464 U.S. 386 (1984) (courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement); *Harmon v. Phillips Petroleum Co.*, 555 F. Supp. 447 (D. Mont. 1982) (court cannot substitute its judgment for that of the legislature or insert what it deems has been omitted).

Unlike the excision of a severable unconstitutional provision, the task urged by proponents of the "limited designation" argument would require a court to traverse the boundaries between the judicial and legislative branches of government and engage in the quintessentially legislative function of formulating a new statute.

19 *See, e.g., Allied-Signal, Inc. v. Purex Industries, Inc.*, 242 N.J. Super. 362, 576 A.2d 942 (N.J. Super. Ct. App. Div. 1990). In *Allied*, plain-

In support of their argument that the New Jersey tolling statute permits the filing of limited designations, petitioners also refer to the affidavit of Paul E. Wermuth, an attorney for the New Jersey Secretary of State. Pet. at 12-13 & n.6. In that affidavit, Mr. Wermuth, relying upon unpublished "advice of the New Jersey Attorney General" rather than a formal opinion from that official, maintains that the Secretary of State permits the "filing of designations by unregistered, foreign corporations of representatives for service of process only with respect to causes of action which have the minimum contacts for due process purposes in this State. Such designations are recorded by this office and insulate foreign corporations filing such designations from causes of action which have no nexus with New Jersey."[20]

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tiff served its complaint on Purex's registered agent for service of process appointed pursuant to N.J. Stat. Ann. § 14A:4-1 and -2 (West. Supp. 1990). [Reprinted at Pet. App. 56a-58a]. The "only question" on appeal was whether plaintiff obtained personal jurisdiction over Purex by virtue of that service. 576 A.2d at 943. "Purex contended that, while it owned real property here, registering its agent for process was only related to New Jersey environmental litigation stemming from its predecessor's activities," and that "it had effectively left the State for purposes of Allied's action." *Id.* Rejecting Purex's limited designation argument, the court stated: "We know of no New Jersey or Supreme Court authority for the proposition that a corporation may limit a state's jurisdiction in the manner Purex suggests and none has been cited to us. Moreover, Purex asserts no limiting action on its part in the appointment process under N.J.S.A. 14A:4-2." *Id.* Drawing on *Burnham v. Superior Court of California, County of Marin*, 110 S. Ct. 2105 (1990), the court held that service on Purex's registered agent conferred personal jurisdiction over that firm "regardless of the nature of the litigation." 576 A.2d at 945.

20 "Affidavit of Paul E. Wermuth" dated September 8, 1988 at paragraph 5. [The affidavit is reprinted in the appendix hereto at Brf. App. 45a.] The affidavit bears the caption of, and is discussed in, *Robinson v. Visual Packaging, Inc.*, 705 F. Supp. 216, 220 (D.N.J. 1989) (rejecting limited designation argument and striking tolling statute under commerce clause). Although the proponents of the tolling statute referred to the affidavit in making their "limited designation" argument, the document was not filed with the clerk of the district court in the proceedings below. Nevertheless, the

Since the Wermuth affidavit is by no means a controlling interpretation of the tolling statute,[21] in the absence of a binding state court precedent the Third Circuit was free to construe the statute in a manner consistent with its plain meaning and reject petitioners' limited designation argument. Indeed, a district court which struck the tolling statute on commerce clause grounds prior to the Third Circuit's ruling below did exactly that.[22]

B. The New Jersey Superior Court, Appellate Division Is Currently Reviewing the Commerce Clause Issue Decided by the Third Circuit

One of the most obvious and compelling reason for denying the writ is the fact that the Appellate Division of the Superior Court of New Jersey is currently considering whether to follow the Third Circuit's opinion in *Juzwin v. Asbestos Corp., Ltd.*, 900 F.2d 686 (3d Cir. 1990).

In *DiFalco v. Subaru of America, Inc.*, the Appellate Division of the New Jersey Superior Court recently granted a defendant's motion for leave to appeal to consider whether the New Jersey tolling provision stricken in *Juzwin* violates the Commerce Clause of the United States Constitution.[23]

Third Circuit considered the affidavit and permitted its filing in the supplemental appendix of the intervenor, the State of New Jersey.

The Wermuth affidavit does not indicate when the Secretary of State initiated the informal administrative practice of accepting limited designations. Brf. App. 45a.

21 *Service Armament Co. v. Hyland*, 70 N.J. 551, 561, 362 A.2d 13, 19 (1976) (" 'An appellate tribunal is . . . in no way bound by [an] agency's interpretation of a statute . . . .' ") (quoting *Mayflower Securities Co. v. Bureau of Securities*, 64 N.J. 85, 93, 312 A.2d 497, 501 (1973)).

22 *Robinson v. Visual Packaging, Inc.*, 707 F. Supp. 216, 220 (D.N.J. 1989).

23 In *DiFalco*, defendant Takata Corporation, a Japanese enterprise not "represented" within New Jersey for purposes of the tolling statute, moved for summary judgment on the ground that plaintiff's action was not filed within the two-year limitations period provided by N.J. Stat. Ann.

Even if New Jersey's Appellate Division does not reach the commerce clause issue in *DiFalco*,[24] grant of certiorari still would not be appropriate in the case at bar since there are a number of "tolling statute" motions pending in the New Jersey state trial courts which provide an opportunity for review of that issue by New Jersey's appellate courts.[25]

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§ 2A:14-2 (West 1987). Relying on the Third Circuit's decision in *Juzwin*, Takata argued that the tolling statute could not be invoked to extend plaintiff's time since the statute is invalid under the Commerce Clause. Both plaintiff and the State of New Jersey as intervenor opposed the motion on the ground that the Law Division should uphold the constitutionality of the tolling statute despite the Third Circuit's decision in *Juzwin*. The trial court trial heard argument on June 15, 1990 and denied Takata's motion "for the reasons stated by the Deputy Attorney General." Transcript of Proceedings at page 30, lines 23-24. That ruling was memorialized by order dated June 21, 1990. Brief App. 49a. Defendant Takata then filed a motion for leave to appeal with the Appellate Division of Superior Court which by order dated August 6, 1990, agreed to review the trial court's order. Brief App. 41a. See also Brief App. at 43a (scheduling order).

24 Based upon this respondent's review of available briefs in that case, it appears that the plaintiff resisted Takata's trial court motion on two grounds: 1) the validity of the tolling statute and 2) a state procedural law argument that her amended complaint against Takata should "relate back" to the filing of her original complaint (naming other defendants) so as to be deemed timely.

25 Counsel for respondent Carey Canada represents defendants in a considerable number of pending state court actions in which the tolling statute issue is potentially outcome determinative and virtually certain to be appealed no matter which side prevails. If a particular state trial court judge upholds the tolling statute and denies our defendant's statute of limitations motion, that defendant will appeal to the Appellate Division. If that state trial court finds the tolling statute invalid under the commerce clause, either plaintiff or the State of New Jersey—which intervenes in such actions to defend the tolling statute—is quite likely to appeal. (Pursuant to N.J. Court. R. 4:28-4(a)-(d), a litigant "question[ing]" the "validity of a statute, executive order, franchise, or constitutional provision of [the State of New Jersey]" in an action to which the state is not a party, must notify the Attorney General who may intervene to defend the statute. In the district court proceedings in the case at bar, the State of New Jersey intervened pursuant to the analogous federal statute, 28 U.S.C. § 2403(b)).

Thus it would be an unnecessary departure from this Court's established practice to devote resources to the resolution of an illusory conflict between that intermediate state appellate court[26] and the court of appeals when the former may, within the next few weeks or months, choose to follow the Third Circuit's decision below. See Rule 10(b).

C. The Third Circuit Utilized Petitioners' "Saving Construction" in Striking the Tolling Statute on Commerce Clause Grounds

This respondent is obligated by Rule 15.1 to point out that the Third Circuit did not ignore the "saving construction" urged by petitioners below.

Petitioners argue that the Third Circuit "abandoned the principle that unnecessary constitutional adjudication should be avoided if a statute can fairly be given a constitutional interpretation" by refusing to employ the "limited designation" construction described above under Point IA. See Pet. at 4; 6-7; 12 & n.6; 14. Contrary to petitioners' assertions, the Third Circuit expressly stated that it evaluated the constitutionality of the tolling statute in accordance with the limited designation argument urged by petitioners and adopted by the district court below.

> The district court concluded that, unlike the Ohio statutory scheme, the New Jersey tolling statute does not compel the conclusion that designation of an agent for service of process subjects a foreign corporation to the general jurisdiction of the New Jersey courts. The court noted the Secretary of State's practice of accepting des-

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Two state court cases in which counsel for respondent Carey Canada soon expects decisions on the constitutionality of the tolling statute are: *Leogrande v. Keene Corp.*, No. W-026197-87 (N.J. Super. Ct. Law Div. Middlesex County) (motion of defendant Pittsburgh Corning returnable September 14, 1990); *Anderson v. Owens-Corning Fiberglas Corp.*, No. W—012500-89 (N.J. Super. Ct. Law Div. Middlesex County).

26 See discussion of the New Jersey Superior Court, Appellate Division's unpublished summary affirmance in *Armenti* under Point IA *supra*.

> ignations of a representative for service of process only for causes of action having a nexus with New Jersey. Such a limited designation, the court held, imposed no unconstitutional burden on interstate commerce.
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> II. As we read *Bendix*, the New Jersey tolling statute would be invalid if it were applied to all foreign corporations, regardless of their connection with New Jersey. However, we will assume without deciding that the New Jersey Supreme Court would interpret the statute to permit designation of an agent for service of process only for causes of action having a nexus with New Jersey. The issue then become whether the statute so interpreted still constitutes an impermissible burden on interstate commerce.

Juzwin v. Asbestos Corp., Ltd., 900 F.2d 686, 689 (3d Cir. 1990). Pet App. 7a-8a. The concluding paragraph of Judge Seitz's commerce clause discussion also notes that the "limited designation" construction of the tolling statute was utilized: "Thus, even with a limiting construction, N.J. Stat. Ann. § 2A:14-22 violates the commerce clause under either [the heightened scrutiny or balancing] test since a nondiscriminatory procedure, less burdensome to interstate commerce, could be adopted by New Jersey." *Id.* at 692. Pet. App. 14a-15a.

Even if one were inclined to accept petitioners' suggestion that the Third Circuit merely "purported" to utilize the saving construction while actually evaluating the statute on the premise that it did not permit foreign corporations to file limited designations,[27] one must note that the court of appeals would have been within its rights in doing so since petitioners' construction is at variance with the plain meaning of the statute and not supported by any binding state precedents. See Point IA *supra*.

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27 See, e.g., Pet. at 4.

II.

THE THIRD CIRCUIT'S DECISION STRIKING THE NEW JERSEY TOLLING STATUTE UNDER THE INTERSTATE COMMERCE CLAUSE IS ENTIRELY CONSISTENT WITH THIS COURT'S PRECEDENTS

A. Heightened Interstate Commerce Clause Scrutiny Is The Appropriate Standard of Review for the Tolling Provision at Bar

Petitioners raise a number of objections to the Third Circuit's resolution of the commerce clause issue. Initially, petitioners complain that the New Jersey tolling provision should not have been reviewed under the "heightened scrutiny" interstate commerce clause standard. See Pet. at 15-17. Petitioners begin their argument with the unusual assertion that "[j]udicial review of state statutes challenged under the Commerce Clause are governed by a two-track standard, similar to the two-tiered scrutiny of the Equal Protection Clause."[28]

Petitioners claim that the "sole basis for the [Third Circuit's] application of the heightened scrutiny standard was its erroneous conclusion that the statute on its face, 'applies to out-of-state corporations but not to New Jersey corporations.' 900 F.2d at 689 and n.3 (9a)."[29]

Contrary to petitioners' assertion, the tolling statute provision at issue in the case at bar—the one which permits "cor-

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28 See Pet. at 15. Respondent Carey Canada understands there are three basic levels of review under the equal protection clause (strict scrutiny, intermediate tier review typically employed in gender discrimination cases, and rational basis review) and three basic standards of review under the commerce clause. *See generally* J. Nowak, R. Rotunda & J. Young, *Constitutional Law* § 14.3 at 528-33 (3d ed. 1986) (regarding equal protection). A brief discussion of the three standards of commerce clause review appears in the Third Circuit's opinion below. *Juzwin v. Asbestos Corp., Ltd.*, 900 F.2d 686, 689 (3d Cir. 1990). Pet. App. 8a.

29 Pet. at 16. Petitioners buttress this argument with the assertion that since the tolling statute has provisions applicable to individual "citizens" of New Jersey who temporarily leave the state, it is a facially neutral, nondiscriminatory enactment. See Pet. at 16-17.

porations" to achieve representation by designating an agent for service of process[30]—applies exclusively "to out of state corporations but not to New Jersey corporations. . . ." *Juzwin*, 900 F.2d 686, 689 [footnote omitted]. As the Third Circuit noted: "The critical words are 'any corporation or corporate surety not organized under the laws of this State.' " *Juzwin*, 900 F.2d at 689, n.3 (quoting N.J. Stat. Ann. § 2A:14-22). Since the New Jersey tolling provision is facially discriminatory, the heightened scrutiny test is appropriate:

> Statutes which discriminate on their face or in their plain effect against interstate commerce are subject to heightened scrutiny. This heightened scrutiny places the burden on the state to "demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means."

Old Coach Development Corp. v. Tanzman, 881 F.2d 1227, 1231 (3d Cir. 1989) (citations omitted) (quoting *Maine v. Taylor*, 477 U.S. 131, 138 (1986)) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

Also unpersuasive is petitioners' argument that the tolling statute should be deemed "a facially neutral, nondiscriminatory enactment" in the case at bar since it also tolls the statute of limitations with respect to individuals who leave the state. Even if one could accept the premise that the existence of a distinct provision depriving individuals of a limitations defense justified the discrimination between foreign and domestic corporations, a binding New Jersey state trial court precedent has stricken the tolling statute on commerce clause grounds with respect to a nonresident individual. *Crespo v. Stapf*, 242 N.J. Super. 254, 576 A.2d 346 (N.J. Super. Ct. Law Div. 1990).

In *Crespo*, plaintiff brought a product liability action alleging personal injuries attributable to a machine supplied by defendant Stapf, a resident of Germany who operates his

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30 The only provision relevant to the case at bar is contained in the final paragraph of the statute: See Pet. App. 6a, or see n. 4 *supra*.

unincorporated business in that nation. The court, reviewing the relevant provision[31] under a balancing test,[32] held the statute unduly burdensome of interstate commerce since "the only method by which a nonresident individual may receive the protection of our statute of limitations is to become a resident of this state." *Id.* at 260, 576 A.2d at 348. "A state 'may not condition this exercise of the defense (of the statute of limitations) on the relinquishment of rights that the foreign . . . (defendant) would otherwise retain.' Among the rights a foreign defendant would retain is the right to choose his residence, and in particular, to choose not to be a resident of this State." *Id.* at 260, 576 A.2d at 349 (citation omitted) (quoting *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 893 (1988)).

Petitioners' next argument against application of strict interstate commerce clause scrutiny is based on the premise that since corporations organized under the laws of New Jersey (as well as those foreign corporations licensed to transact business within the state) are required to continuously maintain "a registered office in [the] State" and a "registered agent [for service of process] having a business office identical with such registered office,"[33] the New Jersey tolling statute is nondiscriminatory in that it "does not impose any burden on nonresident corporations that is not imposed equally on domestic corporations" which must "appoint an agent for service of process as a precondition to obtaining corporate status." Pet. at 7. See also, Pet. at 17 ("No out-

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31 See n.4 *supra*.

32 The court declined to review the provisions regarding nonresident individual defendants under the *per se* test on the theory that: "The purpose of this statute, however, is to preserve causes of action which New Jersey residents may have against nonresidents, not to erect barriers against foreign businesses competing with New Jersey ones." *Crespo v. Stapf*, 242 N.J. Super. 254, 258, 576 A.2d 346, 347-48 (N.J. Super. Ct. Law Div. 1990). This respondent respectfully maintains that the tolling provision in *Crespo* warranted review under the *per se* test.

33 N.J. Stat. Ann. § 14A:4-1(1) (West 1990). Pet. App. 56a-57a. See also, N.J. Stat. Ann. § 14A:4-2(1) (West 1990) (requiring said agent to accept service of process on behalf of corporation). Pet. App. 57a.

of-state-corporation is subjected to a registration burden that is not applied equally to New Jersey corporations"). This previously unasserted[34] argument fails to appreciate the basic difference between *intra*state and *inter*state commerce, and fails to understand the elementary proposition of constitutional law that the scope of permissible state regulation is considerably greater with respect to the former.[35] Moreover, petitioners' argument regarding the scope of permissible state regulations with respect to corporations with substantial intrastate activities is completely irrelevant to foreign corpo-

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34 Since this statutory argument was not raised below, petitioners cannot properly assert it in their petition to this Court. *See G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412, n.7. Petitioner did make arguments below based upon different New Jersey statutes affecting corporations, but they were significantly different. N.J. Stat. Ann § 14A:13-11 (West 1969) pertains to foreign corporations engaged in intrastate business activities, and provides, *inter alia*, that any such corporation which fails to obtain a certificate of authority to transact business in the state is prohibited from maintaining "any action or proceeding in any court of this State." § 14A:13-11(1). Petitioners, citing subparagraph (2) of the statute, argued that since foreign corporations transacting business in the state who fail to obtain a certificate of authority are not precluded from "defending any action or proceeding" the New Jersey tolling statute was not unduly burdensome:

> Furthermore, the denial of a limitations remedy does not even impair the ability to defend a suit on the merits or to raise the equitable defense of laches. The New Jersey statutory scheme explicitly states: [citation to N.J. S.A. § 14A:13-11(2).

Third Circuit "Brief for Plaintiffs-Appellees Stephen and Mary Juzwin" at 9. See *Materials Research Corp. v. Metron, Inc.*, 64 N.J. 74, 312 A.2d 147 (1973) ("transacting business term of § 14A:13-11 does not apply to corporations engaged only in interstate commerce).

In support of their argument petitioners also cited N.J.S.A. § 14:13-3(2) (West 1969) which provides, *inter alia*, that "a foreign corporation shall not be considered to be transacting business within this State" by virtue of its participation in a legal proceeding. § 14:13-3(2)(a). See above-referenced brief at 16 (also citing N.J.S.A. § 14A:13-11(2)).

35 *See, e.g., Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 284 (1961) (non-New Jersey corporation which engaged in "local intrastate business" through New Jersey office with 18 salaried employees could be barred from maintaining action in state court for noncompliance with state statutory scheme requiring such corporations to obtain certificate of authority. *See generally* L. Tribe, *American Constitutional Law* § 6-5 (2d ed. 1988).

rations engaged in purely interstate or (like respondent Carey Canada) international commerce.

Given the facially discriminatory character of the tolling provision at bar, the Third Circuit's use of the heightened scrutiny standard of commerce clause review is clearly proper and in accordance with this Court's decision in *Bendix Autolite v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 891 (1990).

B. The Tolling Provision at Bar Cannot Survive Scrutiny Under the Interstate Commerce Clause Balancing Test

Petitioners maintain that the Third Circuit also erred in finding the tolling statute violative of the commerce clause under the balancing test enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). See Pet. at 18-21. Petitioners do not contend that the statute at bar should have been reviewed under the deferential standard of commerce clause review;[36] rather they maintain that the Third Circuit improperly applied the balancing test in a manner "tantamount to very strict scrutiny." Pet. at 18.

Petitioners' argument that the balancing test was misapplied is based primarily upon their assertion that the Third Circuit's decision below "was in flagrant disregard of this Court's decision in *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 410-11 (1982)."[37] The decision below does not conflict

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36 As the Third Circuit noted: "None of the parties argue that the correct standard to be applied to the New Jersey tolling statute is that of deferential review. New Jersey has, of course, a legitimate interest in facilitating the claims of its citizens, but we are not here concerned with a 'peculiarly strong' state interest, such as health or safety. These are the areas that most commonly invoke the deferential standard. *Juzwin v. Asbestos Corp., Ltd.*, 900 F.2d 686, 689, n.2 (3d Cir. 1990) (quoting *Ford Motor Co. v. Insurance Comm'r of Pa.*, 874 F.2d 926, 941 (3d Cir.), *cert. denied sub nom., United Services Auto. Ass'n v. Foster*, 110 S. Ct. 418 (1989)).

Petitioners' statements to the effect that the Third Circuit should have been "relatively deferential" or shown "substantial deference" to the New Jersey tolling statute appear only in connection with their request for review under the *Pike* balancing test. See, e.g., Pet. at 7 and 18.

37 Pet. at 19. See also Pet. at 6 ("[The Third Circuit's] holding was in direct conflict with this Court's decision in *G.D. Searle & Co. v. Cohn*, 455

with this Court's decision in *Cohn*. In *Cohn*, this Court affirmed the Third Circuit's ruling upholding New Jersey's previous—not current—tolling statute against an equal protection challenge, but nevertheless vacated the judgment below and remanded the case to the court of appeals for consideration of petitioner G.D. Searle's argument that the statute violated the Commerce Clause.[38]

As in the proceedings below, petitioners rely on decisions upholding the previous New Jersey tolling statute against due process[39] and equal protection challenges in support of their argument that the courts' "balancing" of the predecessor tolling statute's burdens and benefits under those constitutional tests impels the conclusion that the current tolling statute should be upheld if reviewed under the "balancing test" employed in commerce clause cases.[40] This argument ignores

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U.S. 404 (1982), a decision which rejected the *identical* overinclusivity attack on the New Jersey tolling statute asserted in the guise of an equal protection challenge.") (emphasis in original); Pet. at 7 ("flagrant disregard"); Pet. at 6 and 19 (Third Circuit "did not even attempt to distinguish" *Cohn*).

38 455 U.S. 404, 412 (1982), *remanded sub nom., Hopkins v. Kelsey-Hayes, Inc.*, 677 F.2d 301 (3d Cir. 1982). The Third Circuit in turn remanded the case to the district court to develop a record regarding the commerce clause issues. 677 F.2d at 302, *on remand*, 598 F. Supp. 965 (D.N.J. 1984). The district court held the predecessor tolling statute violative of the commerce clause and determined that its decision should be retroactively applied. 598 F. Supp. at 969. The Third Circuit reversed the district court's decision only with respect to the retroactivity issue and remanded for further proceedings consistent with that ruling. *Cohn v. G.D. Searle & Co.*, 784 F.2d 460, 467 (3d Cir.), *cert. denied*, 479 U.S. 883 (1986).

39 In the consolidated *Cohn v. G.D. Searle & Co./Hopkins v. Kelsey-Hayes* cases, Third Circuit rejected both due process and equal protection challenges to the previous New Jersey tolling statute. *Hopkins v. Kelsey-Hayes, Inc.*, 628 F.2d 801, 811 (3d Cir. 1980). Since G.D. Searle & Co. tried to assert different due process arguments in the proceedings before this Court, only the equal protection challenge was reviewed. *G. D. Searle & Co. v. Cohn*, 455 U.S. 404, 412, n.7 (1982)

40 See, e.g., Pet. at 6 (stating that the Third Circuit's decision below "was in direct conflict with this Court's decision in *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), a decision that rejected the *identical* overinclusivity attack on the [predecessor] New Jersey tolling statute asserted in the guise of an equal protection challenge") (emphasis in original).

the reality that the "balancing tests" employed in due process and equal protection cases vindicate different interests[41] and are substantially more deferential to state regulations than the "balancing test" employed in commerce clause cases.[42] Indeed, to illustrate this principle one need only recall that although the predecessor New Jersey tolling statute was upheld by the Third Circuit and this Court against equal protection and due process challenges in *Cohn v. G.D. Searle*,

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41 For purposes of due process and equal protection analysis, so-called "economic and social regulations" (such as tolling statutes) are reviewed under the highly deferential "rational basis" test which virtually presumes an enactment valid unless the litigant challenging it shows it to be "demonstrably arbitrary or irrational." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) (due process). Equal protection and due process review require only that the court ask whether the challenged enactment is rationally related to any constitutionally permissible state interest. *See Hopkins v. Kelsey-Hayes, Inc.*, 628 F.2d 801, 809 (3d Cir. 1980). Furthermore, there is authority that review under that standard permits the court to hypothesize as to the motivations of the state legislature to find a legitimate objective promoted by the legislation under attack. *See Weinberger v. Salfi*, 422 U.S. 749 (1975). Since the Commerce Clause vindicates the exclusively federal power over international and interstate commerce, a less deferential standard of review is appropriate than that employed in rational basis due process and equal protection cases reviewing economic and social regulations predicated upon the states' traditional police powers.

42 *See, e.g., Bendix Autolite v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 893-94, text preceding n.3 (1988) ("It is true that serving foreign corporate defendants may be more arduous than serving domestic corporations or foreign corporations with a designated agent for service, and we have held for Equal Protection purposes that a State rationally may make adjustments for this difference by curtailing limitations protection for absent foreign corporations. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982). Nevertheless, State interests that are legitimate for equal protection or due process purposes may be insufficient to withstand Commerce Clause scrutiny"); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1285 (5th Cir. 1978) (Wisdom, J., opinion of the court) (striking an Idaho "takeover statute" under commerce clause balancing test characterized as providing "a stricter standard [of review] than the 'rational relationship' test of due process analysis"), *rev'd on other grounds*, 443 U.S. 182 (1979). *See also* G. Gunther, *Cases and Materials on Constitutional Law* at 311 (9th ed 1975) (cited in *Great Western*, 577 F.2d at 1285); *Juzwin*, 900 F.2d 686, 695. Pet. App. 23a.

that same statute was shortly thereafter stricken as violative of the Commerce Clause.[43]

Contrary to petitioners' assertions that the court below "failed to recognize New Jersey's legitimate interest in its tolling statute,"[44] the Third Circuit expressly acknowledged that interest, but found the burdens of the statute "grossly disproportionate to the state's interest in assisting resident plaintiffs in the pursuit of claims against foreign corporations." *Juzwin*, 900 F.2d 686, 691, 692. Pet. App. 14a.

C. The Existence of a Commerce Clause Violation is Not Dependent Upon a Finding that a State's Enactment Confers Competitive Advantages Upon its Residents

Petitioners seem to argue that the tolling statute does not impermissibly burden interstate commerce since it does not create any competitive advantages for New Jersey businesses. See Pet. at 7, 10, 15-16. While not conceding the factual premise of that argument, this respondent maintains that petitioners' legal theory is far too simplistic a view of the commerce clause and one not adequately supported even by the cases they cite.[45]

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43 See note 38 and accompanying text *supra*.

44 Pet. at 18. See also Pet. at 6 (The [Third Circuit] held that New Jersey lacked a legitimate interest in ameliorating the impact of the statute of limitations. . . .")

45 For example, petitioners' theory fails to account for the heightened scrutiny standard of review applicable to facially discriminatory enactments. See Point IIA *supra*. Furthermore, this respondent does not find support in the cases cited for the broad proposition that creation of competitive advantages for domestic corporations is the definitive test of a commerce clause violation.

III.

EVEN IF THE THIRD CIRCUIT USED AN INAPPROPRIATE STANDARD OF INTERSTATE COMMERCE CLAUSE REVIEW, THE DECISION BELOW STRIKING THE NEW JERSEY TOLLING STATUTE IS WARRANTED UNDER THE STANDARD OF SCRUTINY APPLICABLE TO REGULATIONS BURDENING INTERNATIONAL COMMERCE

Even if this Court determines that the Third Circuit erred in striking the New Jersey tolling statute under the heightened scrutiny or balancing tests applicable to regulations burdening interstate commerce, issuance of the writ would nevertheless be inappropriate since the enactment could not survive review under the most stringent standard of review applicable to enactments burdening "foreign"—*i.e.* international—commerce. Although defendant Carey Canada argued below that the tolling statute could be stricken under the foreign commerce clause, the Third Circuit found it unnecessary to reach that issue in light of its holding that the enactment impermissibly burdened interstate commerce. See *Juzwin v. Asbestos Corp., Ltd.*, 900 F.2d 686, 690, n.6. Pet. App. 12a.

Article I, § 8 of the United States Constitution grants Congress the power "to regulate Commerce with foreign Nations." "This clause has been construed as all but exclusive: 'It is an essential attribute of the power that it is . . . plenary . . . [and that] its exercise may not be limited, qualified or impeded to any extent by state action.' " L. Tribe, *American Constitutional Law*, § 6-21 at 468 (2d ed. 1988) (quoting *Board of Trustees of the Univ. of Illinois v. United States*, 289 U.S. 48, 56 (1933)). [Hereinafter cited as "Tribe"]. *See also Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) (regulation of foreign commerce is exclusively a federal power); J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 125, 131 (3d ed. 1986).

Since the powers of the federal government concerning foreign or external affairs are different in origin and nature from those involving domestic or internal affairs,[46] it is

46 *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Power over domestic affairs is shared by the federal government and the

hardly surprising that state enactments burdening international commerce are subject to stricter scrutiny than those which burden only interstate commerce. "It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny." *South Central Timber Development Inc. v. Wunnicke*, 476 U.S. 82, 100 (1984). In *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), a decision striking a California *ad valorem* property tax statute as applied to Japanese shippers, the Court expressly rejected arguments that regulations burdening international commerce are entitled to no more stringent review under the Commerce Clause than that applied to regulations affecting interstate commerce. *Id.* at 446, 448 and nn. 12 and 13.

As mentioned above, Carey Canada is incorporated under Canadian law, has no corporate offices in the state of New Jersey, has never been registered to do business in the state of New Jersey, and has not appointed an agent for service of process with the New Jersey Secretary of State. Since Carey Canada sold its asbestos fiber "F.O.B. Quebec, Canada"[47] it did not conduct its business operations in the United States and is entitled to have the New Jersey tolling statute reviewed under the exacting standard applicable to state regulations burdening foreign commerce. Given the broad definition of "foreign commerce,"[48] and the obvious impact on such com-

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states since the former's powers were carved from the general legislative powers originally held by the states. In the domestic sphere the federal government possesses only those powers specifically granted to it by the Constitution and those "necessary and proper" to the exercise of those enumerated powers. Power over foreign affairs, however, was never possessed by the states since it passed directly from the sovereign nation of Great Britain to the federal government. *Id.* at 316-18.

47 See n.11 and accompanying test *supra*.

48 Tribe at 468-469. In the proceedings below, Carey Canada called the Third Circuit's attention to a case in which that court declined to employ the broadest permissible interpretation of the term "burden on commerce" for purposes of foreign commerce clause review. As Carey Canada explained below, however, that decision is distinguishable from the case at bar since it involved a nondiscriminatory regulation which presented only a hypothetical

merce in the case at bar, review under the foreign commerce clause would surely strike the tolling statute in the case at bar. Indeed, in *Bendix* this Court struck a similar Ohio tolling statute under a less rigorous interstate commerce clause standard due to the "significant" burdens that enactment imposed. 108 S. Ct. 2218, 2221 (1988). Furthermore, the greater cumulative burden the tolling statute poses to international commerce also argues for invalidation of the statute under the foreign commerce clause.[49]

IV.

RETROACTIVE APPLICATION OF THE THIRD CIRCUIT'S DECISION STRIKING THE NEW JERSEY TOLLING STATUTE ON COMMERCE CLAUSE GROUNDS CONSTITUTES A PROPER APPLICATION OF THIS COURT'S PRECEDENTS

Petitioners maintain that the Third Circuit's ruling according its decision striking the tolling statute retroactive effect represents "an inappropriate application of the standards laid out in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) and *Lemon v. Kurtzman*, 411 U.S. 192 (1973)." Pet. at 22. Petitioners do not assert that the Third Circuit employed a principle of retroactivity which conflicts with a decision of this Court, or a decision of another court of appeals, nor do they ask this Court to enunciate a new rule of law. See Pet. at 22-25.

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burden to foreign commerce: its only potential effect on that commerce was an increase in price to ultimate consumers of the litigant's product. *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 404-407 (3d Cir. 1987). In addition to distinguishing that case, Carey Canada also argued that a broad interpretation of the term "burden on commerce" for purposes of international and interstate commerce clause review is supported by the decisions of this Court. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942) (farmer growing wheat for home consumption subject to regulation under federal power over interstate commerce).

49 The cumulative nature of burdens imposed by the tolling statute was discussed in Carey Canada's opening brief to the Third Circuit at 22.

Respondent Carey Canada respectfully maintains that petitioners' mere claim of misapplication of the correct retroactivity standards does not constitute a sufficiently "special" or "important" matter to warrant issuance of the writ. Rule 10. Indeed, review of the retroactivity issue in accordance with petitioners' request would amount to no more than a repetition of the Third Circuit's meticulous application of the proper balancing test to a case involving a state statute with a long, intricate history.

In making its retroactivity ruling, the Third Circuit, drawing on *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*), applied the three-factor test enunciated by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971):

> First the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07 (citations omitted).

Although *Chevron* calls for consideration of arguments pertaining to each of the three factors, the ultimate decision regarding retroactivity must be based on an overall evaluation of the merits. A litigant seeking to avoid retroactive application bears the burden of establishing that "on balance the weight of the three *Chevron* factors favors prospective application." *Juzwin*, 900 F.2d at 693. Pet. App. 17a-18a. In the case at bar the Third Circuit ordered retroactive application based upon a finding that all three *Chevron* factors favored

retroactive application. *Juzwin*, 900 F.2d at 693-97. Pet. App. 15a to 26a.

Petitioners apparently maintain that the Third Circuit erred in applying the first *Chevron* factor[50] in finding that petitioners "could not have reasonably relied upon the statute in failing to bring suit earlier." Pet. at 23.

Petitioners suggest that their reliance on the tolling statute was reasonable since the previous version of the enactment had been subject only "to several constitutional challenges from 1983 to 1986." Contrary to petitioners' suggestion, the predecessor tolling statute had been challenged on various constitutional grounds since 1963,[51] and was under almost continuous attack from 1978 to 1986 in both federal and state courts.[52] Moreover, the predecessor statute had been

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50 Petitioners do not expressly state which *Chevron* factors they are addressing. See Pet. at 23-25.

51 See *Lemke v. Bailey*, 41 N.J. 295, 196 A.2d 523 (1963) (upholding statute against equal protection challenge).

52 A chronological account of the *Coons* and *Cohn* litigations highlights petitioners' imprudence in delaying the filing of their action.

In 1978, the district court held that by denying the statute of limitations defense to nonresident corporations subject to long-arm jurisdiction, the predecessor tolling statute violated the Equal Protection Clause of the Fourteenth Amendment. *Cohn*, 447 F. Supp. 903, 912 (D.N.J. 1978). In 1980, the Third Circuit reversed. *Sub nom. Hopkins v. Kelsey-Hayes, Inc.*, 628 F.2d 801 (3d Cir. 1980). (Although Searle raised the commerce clause issue in its brief as a subsidiary argument, the Third Circuit declined to address it. See *Hopkins*, 677 F.2d 301, 302 (3d Cir. 1982)).

In 1980 American Honda unsuccessfully argued in both the law and appellate divisions of New Jersey Superior Court that the predecessor tolling statute unduly burdened interstate commerce. See *Coons v. American Honda Motor Co.*, 176 N.J. Super, 575, 424 A.2d 446 (App. Div. 1980). American Honda then sought leave to appeal the issue to the New Jersey Supreme Court. See *Coons I*, 94 N.J. 307, 463 A.2d 921 (1983). When that court refused to hear the case, American Honda appealed it to this Court. *Id.*

In February of 1982, this Court affirmed the Third Circuit's 1980 equal protection ruling in *Hopkins*, 628 F.2d 801, but remanded the case to the court of appeals for consideration of Searle's commerce clause argument. *Cohn*, 455 U.S. 404, 414 (1982).

(footnote continued)

under attack on commerce clause grounds beginning in 1980.[53] As the opinion below so carefully explains, petitioners' delay in filing suit in reliance on the tolling statute cannot be justified. See *Juzwin*, 900 F.2d at 692-95. Pet. App. 18a-23a.

Petitioners also maintain that since the New Jersey legislature drafted the current tolling statute in 1984 specifically to

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In March of 1982, this Court vacated the state court judgment in *Coons*, 176 N.J. Super. 575, 424 A.2d 446 (App. Div. 1980) (rejecting American Honda's commerce clause challenge to the tolling statute), and remanded the case for reconsideration in light of the recent decision in *Cohn*, 455 U.S. 404. *Honda Motor Co. v. Coons*, 455 U.S. 996 (1982). In response to this remand, the New Jersey Supreme Court certified the cause on its own motion. See *Coons*, 94 N.J. 307, 463 A.2d 921 (1983).

In April of 1982, the Third Circuit remanded *Cohn* (*sub nom. Hopkins v. Kelsey Hayes, Inc.*, 677 F.2d 301 (3d Cir 1982)) to district court to develop a record regarding commerce clause issues.

In August of 1982, plaintiff Stephen Juzwin learned of his alleged injury when he was diagnosed as having an asbestos-related condition. In August 1983 the New Jersey Supreme Court held the predecessor tolling statute unduly burdensome of interstate commerce and applied that ruling retroactively. *Coons I*, 94 N.J. 307, 463 A.2d 921 (1983). In January of 1984 the New Jersey Supreme Court heard argument as to whether it should reconsider its retroactivity ruling and in June of that year it issued a decision providing for prospective application. *Coons II*, 96 N.J. 419, 476 A.2d 763 (1984).

In response to *Coons I*, the New Jersey legislature hastily drafted, debated and enacted into law—in August of 1984—a successor [the current] tolling statute.

In December 1984, the district court held that the predecessor tolling statute violated the commerce clause and retroactively applied its decision. *Cohn*, 598 F. Supp 965 (D.N.J. 1984). Like many, if not all significant developments regarding the tolling statute, the ruling was reported at length in the legal trade press. See 115 N.J.L.J. 135 (1985). In 1986, the Third Circuit reversed the district court's decision only with respect to the retroactivity ruling. *Cohn*, 784 F.2d 460, 467.

53 The opinion below states that the "first hint of a commerce clause problem with the New Jersey tolling statute came early in 1982 with the Supreme Court's decision in *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982)." *Juzwin*, 900 F.2d at 693. This respondent notes that the previous tolling statute was challenged in state courts on commerce clause grounds as early as 1980. See preceding footnote *supra*.

cure the constitutional defects of the predecessor tolling statute stricken by *Coons I*[54] and *Cohn v. G.D. Searle & Co.*,[55] plaintiff Juzwin's reliance on the current enactment was reasonable. This argument is also unpersuasive.

As previously stated, following the New Jersey Supreme Court's decision in *Coons I* striking the tolling statute, the New Jersey legislature rushed to enact a replacement. The replacement (*i.e.*, the current tolling statute), enacted in effect under emergency conditions, was identical to the old statute except for the final "designation of agent" provision added to avoid the "forced licensure" defect identified in *Coons I*. See Preliminary Statement *supra*. Since lawyers practicing in common law jurisdictions inevitably reassert legal theories which have prevailed in past cases, a commerce clause challenge to the replacement tolling statute was to be expected. The fact that the legislature merely repaired the one defect identified in *Coons I* without considering whether the revised statute could withstand commerce clause scrutiny made that challenge all but inevitable. The fact that the *Coons I* court struck the "forced licensure" aspect of the predecessor tolling statute does not give grounds for reliance on a replacement statute hastily repaired by addition of an untested "designation of agent" provision. In drafting the current tolling statute, the 1984 New Jersey legislature simply did not correct the long-standing "amenability to service" problem which required the holding below. *Juzwin*, 900 F.2d at 695. Pet. App. 23a.

In support of their argument regarding the second *Chevron* factor, petitioners suggest that Judge Seitz did not give due consideration to the Third Circuit's 1986 ruling requiring prospective application of the district court decision striking the tolling statute on commerce clause grounds. See Pet. at 24-25. While it is true that Judge Seitz did not quote from his opinion in *Cohn v. G.D. Searle & Co. v. Cohn*, 784 F.2d 460 (3d Cir. 1986) (Seitz, J., opinion of the court) in discussing

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54 96 N.J. 307, 463 A.2d 921 (1983).

55 598 F. Supp. 965 (D.N.J. 1984), *reversed in part and remanded*, 784 F.2d 460 (3d Cir.), *cert. denied*, 479 U.S. 883 (1986).

the second *Chevron* factor, Carey Canada maintains that Judge Seitz' opinion below more than adequately explains why the marked differences between *Cohn* and the case at bar required retrospective application of the latter decision.[56]

Regarding the third *Chevron* factor, petitioners claim that equitable considerations favor prospective application of the decision below. Pet. at 25. This assertion ignores the reality that prospective application of the decision striking the tolling statute would cause great hardship to domestic, *i.e.*, New Jersey, corporations as well as foreign corporations which complied with the tolling statute. As the opinion below briefly mentions, under New Jersey law[57] the right of a defendant to seek contribution is not affected by the running of the limitations period. *Juzwin*, 900 F.2d at 696. Pet. App. 25a. "Thus, even New Jersey corporations and foreign corporations who have complied with the provisions of the tolling statute would continue to be deprived of the protection of the statute of limitations when they were joint tortfeasors with a nonrepresented foreign corporation"[58] which will implead them as third party defendants. *Id.*

Also unpersuasive are petitioners' arguments that equity favors plaintiffs who delayed filing their actions in reliance on the tolling statute,[59] and that the Third Circuit improperly

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56 See *Juzwin*, 900 F.2d 686, 692-697 (3d Cir. 1990) (Seitz, J., opinion of the court) (retroactivity discussion). Pet. App. 15a-26a. Since application of the *Chevron* retroactivity test requires a case-specific analysis, it would have been improper for the Third Circuit to uncritically repeat its 1986 ruling in *Cohn*.

57 N.J. Stat. Ann. § 2A:53A-1, *et seq.* (West 1987); *McGlone v. Corbi*, 59 N.J. 86, 279 A.2d 812 (1971) (defendant has right to implead unjoined, joint tortfeasor for purposes of proving their common liability even after limitations period on plaintiffs claim has run).

58 This is often the situation in asbestos and other toxic tort actions in which plaintiffs join a large number of defendants.

59 Equity certainly does not favor a plaintiff like Juzwin who, after recovering Workers Compensation settlements, delays for years before filing his action. See n.10 and accompanying text *supra*. The doctrine of laches "is based upon the maxim that equity aids the vigilant and not those who slumber on their rights." H. Black, *Black's Law Dictionary* at 787 (5th ed. 1979).

ordered retrospective application without the benefits of factual determinations by the district court.[60]

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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60 See Pet. at 5. Petitioners should have submitted all their proofs when the retroactivity issue was litigated in district court. See Jt. App. at 16 (regarding Carey Canada's argument to the district court in favor of retroactive application).

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

DOCKET NO. L-45449-87

ARMENTI, *et al.*,

Plaintiffs,

—vs.—

CAREY CANADA, *et al.*,

Defendants.

MOTIONS

Middlesex County Courthouse
New Brunswick, New Jersey
May 27, 1988

Before: Honorable John E. Keefe, J.S.C.

APPEARANCES: Wilentz, Goldman & Spitzer
By: Philip A. Tortoreti, Esq.,
Attorneys for the Plaintiffs

McCarter & English
By: Gita F. Rothschild, Esq.,
Attorneys for Carey Canada & Turner & Newell

Goldfein & Joseph
By: Roseann Lynn Brenner, Esq.,
Attorneys for ACL & Bell

Harry Z. Haushalter, Esq.,
Deputy Attorney General
Attorney for the Intervenor

Stanley Grabon, C.S.R.
Official Court Reporter

[2] (May 27, 1988.)

THE COURT: Armenti versus Carey Canada.

MR. ROTHSCHILD: Gita Rothschild; McCarter & English, for Carey Canada and Turner & Newall.

MS. BRENNER: Roseann Brenner for A. C. L. and Bell.

MR. HAUSHALTER: Harry Haushalter for the intervenor, Attorney General of New Jersey.

MR. TORTORETI: Philip Tortoreti for Wilentz, Goldman & Spitzer, for the plaintiff.

THE COURT: I assume no one has any opposition to the Attorney General's motion to intervene on this motion; is that correct?

MS. ROTHSCHILD: That's correct.

THE COURT: Okay. That motion is granted.

MR. HAUSHALTER: Thank you, your Honor.

THE COURT: Mr. Tortoreti, this is your motion.

MR. TORTORETI: Good morning, your Honor. As you know, this is a motion addressing the—affecting the constitutionality of the statute, the new tolling statute. I think that we can say that it is not in dispute that the defendants here do not have an agent designated for service of [3] process. We can say that it is not disputed that if the tolling statute is constitutional, that the statute of limitations has not run. They do not dispute that the new tolling statute was made effective law in 1984 and, therefore, there was no break between the Coons-II decision and the tolling statute, the new tolling statute.

What we have is a constitutional challenge.

THE COURT: Well, the relief that you seek specifically is to strike the defense of statute of limitations.

MR. TORTORETI: That's correct. The statute of limitations has not even commenced running as of this date as against these defendants because they do not have agents appointed for service of process.

As regards the due process and equal protection challenges, I don't know that there's anything that I have to say. I mean that has been addressed thoroughly in prior decisions. I have nothing to add that.

As to the, as to the challenge which was effective in overturning the prior tolling statute, we start out that there has to be a presumption in favor of constitutionality by the [4] court. The case law is clear, that your Honor must presume constitutionality, and further that your Honor, if you are leaning toward an interpretation that might find the statute unconstitutional, you must interpret it in a constitutional manner, if you can reasonably.

Given that background, given the fact that there's also a presumption that the legislature acted with knowledge of the constitution and in consideration of the constitution, and given the fact that this legislative act, the amendment to the tolling statute specifically states that the legislature was addressing the constitutionality of the statute, I think it's clear that even if we say no more and don't even address the merits, that this statute is constitutional at least as regards this court's review of it.

Going to the merits of the argument, Coons-1 found the prior tolling statute unconstitutional because it was silent on designation of an agent for service of process by a foreign corporation. That being the case, it looked to the other avenues by which a foreign corporation could designate an agent, and the majority, the four member majority as compared to [5] the three member dissent found the only way that could be done is by actually registering to do business.

They then characterized that as a forced licensure and it was therefore a violation of the commerce clause. We do not have that now. What we have now is a designation, a simple designation for service of process. There is absolutely no other baggage that goes along with it. Simply designated for service of process. They can do this by a simple filing with the Secretary of State's office.

They have argued that subjects them to the jurisdiction of this court and the courts of New Jersey and, therefore, they are giving up jurisdictional defenses. Those jurisdictional defenses have been unsuccessful as to these defendants in the past. But even disregarding that, they offer absolutely no indication whatsoever of one instance where designating an agent for service of process pursuant to the new tolling stat-

ute has resulted in a waiver of any jurisdictional defenses, in personam jurisdictional defenses.

I would submit, your Honor, first of all, [6] that even if they did, if it was a waiver, that does not render the statute unconstitutional and that does not constitute a forced licensure and you would be forced into a balancing test under the applicable law, not a per se violation.

THE COURT: Let me stop you for a second. You're saying that there's nothing in the statute that implicates or suggests that someone who files and designates an agent for the service of process is consenting to the jurisdiction of the court in personam.

MR. TORTORETI: That's correct.

THE COURT: All right.

MR. TORTORETI: Absolutely true.

THE COURT: So that they can come in and defend.

MR. TORTORETI: Absolutely.

THE COURT: On due process.

MR. TORTORETI: That's correct.

THE COURT: All right.

MR. TORTORETI: They can say that this court or any court in the State of New Jersey has no in personam jurisdiction.

Even if they did lose the in personam jurisdiction defense as a result, I would submit [7] that the balancing test procedure as compared to the per se violation procedure would be in place. But I think, by the way, your Honor has to look at the statute as constitutional.

What the tolling statute does by allowing appointment of an agent for service of process is places the foreign corporation as regards service of process in exactly the same position as the domestic corporation with respect to service of process, that is, that a New Jersey plaintiff can serve process on a putative or a potential defendant by serving somebody in New Jersey.

Now these defendants argue that we have been able to serve them in Canada, so that that's ridiculous. First of all, these are not the only foreign corporations that exist in the world. There are lots of them. Number two, if we—it so happens that we are able to serve them with process, these defen-

dants, because they have been involved in asbestos litigation in New Jersey for ten, twelve, fifteen years.

The court has to view this in the context of the general law, the general situation. This is a constitutional challenge. That's pointed out in my papers, that at least Asbestos Corporation [8] Limited at one point in time acknowledged that the new tolling statute is constitutional and they were trying to undermine the retroactive effect of the statute.

THE COURT: Mr. Tortoreti, now that you have got me into the balancing test, let's get to the critical issue. Tell me what the difference between our statute and the Ohio statute is. Distinguish, in other words, the Bendix case from—

MR. TORTORETI: The Ohio statute, your Honor, did not carry with it an appointment for service of process clause. The Ohio statute was the same as our old tolling statute. If you read the opinion, the opinion is completly clear.

THE COURT: I've read it.

MR. TORTORETI: All right. I'm not implying that you didn't, your Honor. You might have drawn that inference.

THE COURT: Yes, I might have.

MR. TORTORETI: We are suggesting that maybe counsel for A. C. L. and Bell didn't read the opinion.

MS. BRENNER: I object to that.

MS. ROTHSCHILD: Thanks, Phil.

[9] MR. TORTORETI: You did get me off track. I'm sorry. When the court in the federal court in Ohio indicated that they were dealing with conjecture and speculation, it was because there was conjecture and speculation as to whether or not there could be a simple designation. We do not have that here. We have an absolute designation provision.

I have the opinion—I do not have the opinion here, your Honor, but I quoted it in my brief.

THE COURT: What are you looking for?

MR. TORTORETI: At page 189 of the opinion they characterize it, the argument made by the party trying to toll the statute, as highly speculative and void of any statutory support. The statutory support that they are referring to, if you read that clause in pari materia with the rest of the decision, is that there is no provision in that statute for appointment

of service of process, of an agent for service of process. We have that here.

I think that it's a distinguishable statute. It's really more akin to the tolling statute that was found unconstitutional.

[10] THE COURT: Okay. Thank you. Mr. Haushalter?

MR. HAUSHALTER: Thank you, your Honor. Let me concur with Mr. Tortoreti's argument, and he is correct with regard to the Bendix decision. I think that page 189 the court said with regard to Bendix's suggestion that the corporation may merely notify the Secretary of State of it's designated representative, we note simply here that this argument is highly speculative and devoid of any statutory support. That's the Coons-1. And the Ohio court simply indicated there was no statutory support for a foreign corporation to merely designate an agent. It must actually register to do business. The forced licensure.

We have here an argument of forced representation. That seems to be the argument that in order for a foreign corporation to avoid the tolling it must designate an agent, and by doing so it exposes itself to suit from any plaintiff, from anywhere. We disagree. That is not, in fact, the case.

We pointed out first of all that the designation that can be filed with the Secretary [11] of State clearly can be limited so that the in personam defense is not destroyed, that the foreign corporation can still defend on the basis of no in personam jurisdiction.

THE COURT: Of course that's not provided for in the statute, though, is it?

MS. HAUSHALTER: This is part of the jurisdictional right of the Secretary of State to accept these types of designations and he, in fact, is doing that or she is doing that. That in fact is the way that many of these foreign corporations are designating agents.

THE COURT: That's exactly what the Sixth Circuit found wrong with the Ohio statute in that it did not provide for that exception.

MR. HAUSHALTER: Well, we feel our statute does provide for it.

THE COURT: Why would you have to? I guess the point that I am getting to is why does the Secretary of State really have to do that? Why would the Secretary of State have to affirm in some way that a person who files and names an agent in this state would have the right to contest in personam jurisdiction? It's a constitutional right anyway.

[12] MR. HAUSHALTER: The Secretary of State is just accepting filings. I don't think that it's up to the Secretary of State to gauge whether the filings are proper or not. She is accepting these filings. Whether those filings are valid, whether in fact the limited designation has validity, would have to be argued in individual cases. We maintain that it's a proper method for dealing with this situation.

THE COURT: I think that you think that I am fighting with you, but actually I think that I am agreeing with you. Justice Stevens in his dissent in the Coons case points out the fact that one can—no state legislation can ever void a party's right to come into a jurisdiction and contest on the due process clause jurisdiction over the person. I think that I am agreeing with you.

MR. HAUSHALTER: We subscribe to your Honor's position. I think that Mr. Tortoreti appropriately noted that we had three justices in Coons-1, and they dissented, but they dissented with regard to the very issue that was decided in that Bendix case, namely that you do have, or they felt that the Secretary of State could accept the [13] designations without having these foreign corporations actually file to do business. The point being once having reached that result, those three justices said that that kind of a designation is constitutional under a balancing test.

And the critical quote is on page 328 of 94 N.J., where the court is saying, "the message they send to the"—this is the foreign corporations—"message they send to the New Jersey consumer is clear and forceful. The legislature has asked manufacturers to send one little brief message about where they can be found if anything goes wrong with the motorcycle. Again, this is Honda, the defendant here."

If this kind of an argument, the forced representation is sustained, then we have no tolling statute. There is just no

tolling statute. This destroys the very heart of the tolling statute, which means that a foreign corporation which cannot be reached can wait two years, or whatever the appropriate statute of limitations is, and then come into the state and not be concerned about ever being sued. Forget about the long arm, of course.

[14] This is really the critical aspect of this case, judge, because if this kind of an argument is sustained, there's no tolling statute, and the New Jersey plaintiffs are not going to be protected and this is the critical issue that was decided in Coons-II decision, and in the Searle case where we had very clear statements by the U.S. Supreme Court about the importance of this policy of sustaining causes of action for New Jersey plaintiffs.

And if you don't have a tolling statute you can't protect those plaintiffs, and I think that's ultimately what has to be decided in this case and that is what the balancing test is all about.

Thank you, judge.

THE COURT: Isn't that basically the issue here? If I knock out this statute, there's no tolling statute that can ever be passed and not violate the interstate commerce clause. How less minimal can the intrusion be than the New Jersey legislature has made it in this amended statute?

MS. BRENNER: Well, your Honor, I have a different interpretation of the Bendix case than counsel.

THE COURT: That's not my question. That's [15] not my question. My question is what I've just asked you. How less intrusive could a statute be, a tolling statute be than the New Jersey statute already is?

MS. BRENNER: The statute that would contain a provision that would protect a foreign corporation's right to object to in personam jurisdiction.

THE COURT: I just made that point before. Do you disagree with the point that you have that right regardless of what a statute says or doesn't say? How can a statute ever preserve for you a right that you have? It's part of the organic law.

MS. BRENNER: It's our position, your Honor, that it's quite possible that by designating an agent we could possibly be waiving that right.

THE COURT: Under what theory?

MS. BRENNER: Under the theory that then there is a resident agent of the state who is accessible to be served with suit by any New Jersey claimant on any cause of action filed in any state or federal court in New Jersey, and it's a position of A. C. L. and Bell that they always [16] object to in personam jurisdiction.

THE COURT: Let me give you a hypothetical, okay? Let's assume that Bell Asbestos Mines delivered its fiber into the United States but not to the State of New Jersey. Your driver went from Canada, around the State of New Jersey, to Delaware, left off his fiber, and instead of going back the same route to Canada, came up the New Jersey Turnpike, and someone—and Mr. Tortoreti happened to see him going up the Turnpike and hit him with process. There's no question that he was served, right?

MS. BRENNER: Yes, your Honor.

THE COURT: Are you telling me that you can't come in to court and raise the question of jurisdiction over the person of Bell Asbestos based upon that service?

MS. BRENNER: No, your Honor.

THE COURT: All right. Service is a separate issue from jurisdiction, isn't it?

MS. BRENNER: Yes, your Honor.

THE COURT: Okay.

MS. BRENNER: Your Honor, if I may address the Bendix case, I think what's important that everybody is overlooking is the fact that the [17] Sixth Circuit found that the impermissible burden, irrespective of what is required of the defendant, was the fact that they had to, which your Honor just nullified my argument about waiving jurisdiction, whether they have to choose to be exposed to suit ad infinitim or subject themselves possibly to service of process of claims that may not otherwise meet minimal contacts.

THE COURT: I'm not making any holding now. I'm asking you questions and I think that's an interesting question that

we have to address, and I guess what I'm suggesting is the Sixth Circuit didn't have to say that much. That's all that I am saying. I'm not bound by the Sixth Circuit.

MS. BRENNER: That's correct.

THE COURT: But in terms of analyzing the law, I'm just wondering whether they had to say that much. Is the Ohio statute different from our prior statute, or is it basically identical?

MS. BRENNER: It's similar statute, your Honor.

THE COURT: Okay. Getting back to my original question then. If you are in a jurisdiction that's governed by the Sixth Circuit opinion and you are a legislator, what kind of a [18] tolling statute can you pass that would meet the constitutional muster of Bendix? The answer is none, right?

MS. BRENNER: Well, one that provides for preserving that right, your Honor.

THE COURT: All right.

MS. BRENNER: Which your Honor has stated to me you believe that is an organic right under the due process clause.

THE COURT: Well, do you disagree with me?

MS. BRENNER: I would debate it, your Honor.

THE COURT: Well, you're a good advocate. I would expect you to debate it, but now I want you to tell me why you disagree with me legally. What's wrong with that analysis?

MS. BRENNER: I'm at a loss, your Honor.

THE COURT: Okay. You have raised the defense of laches.

MS. BRENNER: Yes, I have, your Honor.

THE COURT: In the event that I should find that the statute is constitutional, you say that, nonetheless, the plaintiff's claim is barred by the doctrine of laches.

MS. BRENNER: That's correct, your Honor. [19] I believe that if you take the intent of the tolling statute, which has been stated by counsel and your Honor to protect claims of New Jersey plaintiffs, and you look to the doctrine of laches which states that a plaintiff who has inexcusably delayed bringing a claim, the only excusable delay for a plaintiff to bring a claim under—I believe Searle and Velmohos implicitly state if a plaintiff was unable to serve a foreign, unrepresented foreign corporation due to the fact that they do not

have a designated agent or haven't registered to do business in the State of New Jersey, Velmohos stated flatly in clear language in the footnote that if an unrepresented foreign corporation does not have the defense of the statute of limitations and the plaintiff has waited until it expired to bring suit, that defendant is permitted to raise the defense of laches.

Searle—and the United States Supreme Court quoted that language and stated flatly a defendant has that right to raise that defense. Implicit in that statement along with the statement of the court as to the interests sought to be protected by the tolling statute, the interests to be **[20]** protected is a plaintiff who can't find the defendant who has run out of time because of that difficulty.

Well, if a plaintiff waits eight, nine, ten years and a defendant is as easily served as A. C. L. and Bell within twenty-two days after they file suit, we don't see—I can't find the inexcusable, I mean the excusable delay. It's our position that it's inexcusable. Plaintiff has averred nothing to explain why he waited eight years to bring this suit after he was diagnosed in 1980. The suit was filed in '87.

THE COURT: Let me ask you a question. What is laches?

MS. BRENNER: That's an equitable doctrine, your Honor.

THE COURT: It's a defense, right?

MS. BRENNER: That's correct.

THE COURT: Who has the burden of proof on the defense?

MS. BRENNER: I do, your Honor.

THE COURT: Okay. And it's clear, isn't it, that laches is something that—as applied where the claim is not barred by the statute of limitations, correct?

[21] MS. BRENNER: Excuse me. I'm sorry.

THE COURT: Laches is a defense that can be used only where the claim is not barred by the statute of limitations. You don't need it otherwise.

MS. BRENNER: Right.

THE COURT: Okay: So the question of delay in filing suit has to be linked up with another element which you forgot to discuss, right? There's two elements to it.

MS. BRENNER: Prejudice, your Honor.

THE COURT: Right.

MS. BRENNER: It's obvious that a defendant sued eight years later in that witnesses, evidences, each year passes, it's either lost, misplaced, destroyed.

THE COURT: That's the problem with asbestos litigation in general, isn't it?

MS. BRENNER: That's correct, your Honor, and that's why you can't let stale claims be coming into court for no other reason than the plaintiff just didn't want to be coming into court until eight years later, and they are well aware of the situation, and this is well publicized litigation. A. C. L. and Bell have been involved **[22]** in this for years.

THE COURT: Tell me specifically how your client is prejudiced in this case.

MS. BRENNER: The man worked and was diagnosed in 1980. I have no information, I don't have any information in the papers as to his, how long he was employed and where he was employed.

THE COURT: You know where he was employed. You know from the complaint where he was employed, don't you?

MS. BRENNER: I'm not sure, your Honor.

THE COURT: I know from reading the briefs where he was employed.

MR. TORTORETI: Only because of your Honor's order which requires that we plead it.

THE COURT: All right. I also know that your client has been involved in litigation out of this plant for at least the last nine years that I have been sitting on asbestos litigation. Now I want to know how specifically in this case your client was prejudiced by the fact that he didn't file suit earlier. What witnesses have been lost because of his delay? Not because of the latency of the disease, which is a problem in and of itself, but because of his delay. What witnesses **[23]** have been lost?

MS. BRENNER: As a practical matter, your Honor, there's another area that has to be looked at. The only people that are, because of the tolling statute, the only defendants, viable defendants in this case, if the tolling statute is declared constitutional, is the unrepresented foreign corporation.

THE COURT: Not true.

MS. BRENNER: Unless the unrepresented foreign corporation now turns around and brings in the domestic or resident defendants.

THE COURT: What's wrong with that?

MS. BRENNER: That's a whiplash effect. The represented defendants in the state, they lose the benefit of the statute of limitations as well.

THE COURT: That's the way it goes. The statute of limitations on a claim for contribution doesn't arise until the judgment is entered against you.

MS. BRENNER: That's correct, your Honor.

THE COURT: That's to protect you, right? That protects you.

MS. BRENNER: Minimally, your Honor. If it never comes to judgment, if you never get a [24] judgment, then obviously you are not going to be hit for contribution or indemnity.

THE COURT: Exactly.

MS. BRENNER: Defendants originally have the benefit of that statute of limitations. The statute effectively eliminates the statute of limitations in asbestos or any litigation, actually, for resident as well as non resident defendants.

THE COURT: I'm still looking for prejudice. Show me prejudice and maybe they don't get the benefit of the statute. I'm still looking for it. Tell me where it is.

MS. BRENNER: Well, your Honor, I still think it's because the only viable defendants now are the unrepresented foreign corporations. Whether or not there's indemnification or contribution, they are still going through the cost of litigation; that's prejudice. Cost of litigation is awfully high. A lot of these cases obviously never come to trial. A lot do, but a lot don't come to trial.

I think that there's extreme prejudice in situations such as this where the statutes run on the resident defendants, I'll call

them, as [25] opposed to the unrepresented foreign corporations.

THE COURT: Okay. Thank you. Ms. Rothschild?

MS. ROTHSCHILD: Your Honor, you directed a question which asked if this tolling statute is declared unconstitutional, what less intrusive statute could be drawn? And I think that there is an answer to that, your Honor, because I think that I disagree with Mr. Tortoreti that this statute must be viewed only in the context of all of those foreign corporations who are not defendants in this case. I think quite the contrary. The statute ought to be viewed in this case in the context of these defendants, in the context of defendants who have been accepting service, appearing in this court, and defending cases, paying settlements and judgments for the last eight years.

And I think a statute could be drawn which excepts from its provisions defendants like these, defendants who do accept service and who do come in and defend and who behave in New Jersey just like domestic corporations in the context of responding to lawsuits.

THE COURT: But the Supreme Court of the [26] United States in the Searle case said that is not a legitimate argument when you're talking about the constitutionality of a statute, at least from the point of view of equal protection.

MS. ROTHSCHILD: I don't think that Searle made a distinction between defendants who have an agent for service of process and defendants who, although they don't have an agent for service of process, are amenable to service, accept service and come in and defend.

THE COURT: I think that they do.

MS. ROTHSCHILD: I think that they do not view in the context of a, of this situation, I don't think that they declare such a statute as the type that I have hypothesized to be unconstitutional.

THE COURT: Justice Blackmun's opinion says as follows. "It is true, of course, that respondents had little or no trouble locating this particular, well known defendant-petitioner, but the tolling provision is premised on a reasonable assump-

tion that unrepresented foreign corporations, as a general rule, may not be so easy to find and serve."

MS. ROTHSCHILD: Well, I don't think that [27] statement means that if you drew a statute which provided for the unrepresented foreign corporation who is not easy to find and serve, such as the statute as it exists now, but excepted and gave the benefit of the statute of limitations to those who not only are easy to serve but who voluntarily come in and defend, then that would not be unconstitutional under any decision of the Supreme Court.

THE COURT: How does a plaintiff do that? How do you draft a statute like that in the first place and, secondly, how do you put a plaintiff in a position where they have to know whether they are dealing with someone that's easy to serve or someone that's difficult to serve?

MS. ROTHSCHILD: Doesn't the plaintiff have an obligation to, with reasonable speed and diligence, after discovering that he has a cause of action, to file a complaint? Isn't that the basis of the statute of limitations, to protect against the prejudice that may occur generally, as a general matter, by the disappearance of witnesses and staleness of evidence?

THE COURT: All the legislature is trying to do here is to put the plaintiff and the [28] defendants on the same playing field, and it has to be level. It can't be uneven. And what they're trying to do is saying let's make it a level playing field and let the plaintiff have the same chance of suing a foreign tort-feasor as they do a resident tort-feasor.

MS. ROTHSCHILD: That's right, but this statute doesn't do that. What this statute does is give the plaintiff, balances it in favor of the plaintiff because the plaintiff here can sit on his cause of action, vis-a-vis a foreign corporation that is well known to him, that has been in this state defending cases, the same kinds of cases, and playing settlements and judgments for the last eight or ten years, can sit on that cause of action simply because that foreign corporation has not designated an agent, has not done a ministerial act of designating a agent for service of process.

THE COURT: That's an argument that has been raised and found wanting in two cases, Velmohos, and in the Searle case.

MS. ROTHSCHILD: But no, because those two cases were challenged under equal protection and due process grounds. But the Supreme Court found [29] under commerce clause constraints that the argument which wasn't advanced in those two cases and which would have succeeded was sufficient.

Your Honor has argued that there is a difference between—

THE COURT: I'm not arguing anything. I'm asking questions.

MS. ROTHSCHILD: Your Honor last posited that there may be a difference between service of process and acceptance of jurisdiction.

THE COURT: Sure.

MS. ROTHSCHILD: And that there is nothing in the statute which specifically waives a defendant by appointing an agent to—waives the claim that there's no personal jurisdiction. It seems to me that that argument is as highly speculative and devoid of statutory support as the argument that was addressed by the Sixth Circuit, and while we have the representation of the Attorney General's office that that is in fact what he or she does, there certainly is no statutory support one way or the other to say that.

And although your Honor has suggested that perhaps by designation of an agent you don't waive [30] your right to assert lack of in personam jurisdiction, the very nature of the agency concept is that the Secretary of State or whomever it is that you appoint is your alter ego for accepting service of process, and by accepting service of process it is at least evidence of, if not a waiver, and I don't necessarily concede that it's not a waiver, that you accept.

That's not like being slapped with a summons as you drive up the New Jersey Turnpike. That is your agent and alter ego to accept service of process. Even if it's not a waiver, it's certainly evidence of a submission to the jurisdiction of this state whether or not you would be subject to the jurisdiction

of this state under the minimum contacts theory had you been served under the long arm statute somewhere else.

So I think that there is an intrusion, if there's a choice that the defendant must make, and that really in most cases the way that you come in and contest personal jurisdiction is that you are served under the long arm statute and make a special appearance for the purpose of contesting jurisdiction, and so it permits you to come into court and not waive, by coming into this state, [31] any defenses that you have, but for the ability to make a special appearance you would have to come in, and once you come in, I think historically it has been been the rule that you have submitted to the jurisdiction of the court.

By appointing an agent, your agent to accept service of process, I think that there is a reasonable argument that can be made that you have done that there too. I don't suggest that the defendants I represent necessarily have a good argument regarding minimum contacts. But if we are to view the statute as it applies generally, I am virtually certain that there are defendants out there who do. But in the context of these defendants, I think that there is a statute that can be drawn that would not infringe on commerce clause considerations and would be sustainable under the protection and due process clauses.

As some of us have recently learned, it doesn't take much to sustain a statute or a court made rule under the equal protection and due process clauses, and I don't think that there would be anything in the less intrusive statute that I described that would change that.

The last point that I would like to address [32] is that I think that the phrase highly speculative and devoid of statutory support in the Sixth Circuit case is equally susceptible to the interpretation that what is highly speculative and devoid of statutory support is the assertion that the defendants may do this, that is, appoint an agent for service of process and thereby avoid that Catch 22

THE COURT: Can I just read to you a footnote from Justice Steven's dissent in the Searle case? Mind you, he's dissenting.

"I do not understand the court to be holding that New Jersey has a legitimate interest in attempting to require all corporations to submit in all cases to the jurisdiction of its courts, and that discrimination against unregistered foreign corporations is justified by the state's desire to accomplish this purpose. Since a state may not enact a law that prohibits a foreign corporation from asserting a due process defense to an exercise of personal jurisdiction by a state court, I do not believe that the state may justify a classification that disfavors unregistered foreign corporations on the ground that they refused to take action that would [33] accomplish the same purpose."

MS. ROTHSCHILD: As your Honor correctly pointed out, we now have dicta in a dissent, and I am not sure how persuasive that would be in the face of a challenge to a statute which—

THE COURT: Well, that's what he's saying the majority is saying. He is saying that the majority is saying that they are not construing the tolling statute by denying a foreign corporation the right to contest in personam jurisdiction. That's the whole court. He's merely making an observation as to what the entire court seems to agree on.

MS. ROTHSCHILD: But that's not in the context of a statute which requires you to appoint an agent for service of process in order to take advantage of the statute of limitations. I don't know that he would say that when we're dealing with that type of a statute.

THE COURT: Thank you. I'm going to decide the motion today, although I reserve the right to file a formal opinion in the event of an appeal.

It is my view that the Bendix case is not binding on the courts of this state. I find that the facts of that case are distinguishable from [34] the facts of the current case. The Ohio statute seems to be very similar to the first statute promulgated in the state which the Coons-1 opinion found to be wanting under the interstate commerce clause, that is, the Ohio statute in effect required licensure as well as the registration of an agent to effect service of process in order to toll

the Ohio statute of limitations. That, in effect, was the problem with our first statute in New Jersey.

The first analysis I suppose is whether this statute interferes with interstate commerce to the point that it is unconstitutional. And we are recommended by case law to apply either the per se test or the balancing test to that question. It is suggested, I think, even in the Bendix case, that the per se rule should not be applied where it is clear on the face of the statute that the legislature has not intended to prefer its state economically over that of another state, or where the undeclared intent of a statute is not to prefer the home state economically over a foreign state.

And I think the tolling statute, although it clearly has impact on out of state [35] corporations, is not designed to favor either defendants or plaintiffs within the state over out of state defendants. First of all, it affects out of state persons, that is individuals, and out of state corporations. So it's not aimed simply at commerce conduct.

Secondly, it doesn't favor either defendants or plaintiffs in the forum state. As I indicated before, it's my view that this statute simply places all the parties on the same level playing field and gives the plaintiff the opportunity to serve a tortfeasor who is a resident of New Jersey the same way that he would serve a non-resident defendant, that is, it simplifies the service of process only and makes everyone equal in that respect.

The question then is, and I think that the legitimate state interest involved in this statute has been so well addressed and decided by Velmohos and by the Cohn versus Searle case that I'm just going to jump right over it and go to the question of whether under the balancing test, since we have legitimate state interests that are being advanced by the statute, whether there is a less intrusive way of impacting on interstate commerce but [36] accomplishing the same state goals and results.

It would appear to me that this amendment to the statute was obviously taken from the legislative point of view of meeting the constitutional infirmities of the prior statute, and

the legislature was attempting to find the least intrusive way of doing it.

And all a foreign corporation need do in order to gain the benefit of our statute of limitations is to designate an agent for the service of process by filing a paper. I believe that if this court were to adopt the Bendix opinion to this current statute there would be no way a legislature in the United States could pass a tolling statute that would comply with the interstate commerce clause.

In my view, it is incorrect to make the observation that by requiring someone to file a piece of paper designating an agent for the purposes of service you are consenting to the in personam jurisdiction of the forum state. That I think is a fatal analysis of the Sixth Circuit. Service of process and in personam jurisdiction are distinct questions, and I think clearly the organic law permits a defendant to come before the [37] forum court and say you don't have jurisdiction over me on the typical due process grounds that are always advanced in questions of jurisdiction. And I think that's clearly suggested by the Supreme Court of the United States in the Cohn versus Searle case, not only by the majority, but also by the dissent.

And I think that it's unnecessary to require a state legislature to say to get the benefit of our statute of limitations you have to file a piece of paper designating an agent for service of process and, by the way, just to remind you, you do have a constitutional right to contest in personam jurisdiction under the due process clause of the United States Constitution. I just think that's unnecessary, and that is, as I perceive this argument, to be the only criticism of the New Jersey statute, save the fact that no tolling statute whatsoever will meet constitutional muster in the United States, and I find it difficult to believe in view of the fact that the United States Supreme Court in the Cohn versus Searle case has enumerated several reasons why they think the states have a legitimate interest in protecting their citizens by passing a [38] tolling statute. So it seems to me by reading the Cohn decision that the United States Supreme Court was not saying

there is no tolling statute that can ever be passed that would not meet constitutional muster.

For those reasons I find the New Jersey tolling statute not be a burden on interstate commerce and not to be a violation of the United States Constitution.

On the collateral issue of laches, I agree that the Cohn case seems to suggest that in order to pass the equal protection clause muster, laches would have to be an affordable defense in order for foreign defendants to be treated fairly in terms of the possibly prolonged time between accrual of the cause of action and institution of suit. But laches is an affirmative defense. The defendant has the burden of proving not only an undue delay in terms of filing the complaint, but also the presence of real prejudice by reason of the delay, and you have to differentiate in toxic tort cases the real problems that result because of the latency of asbestos related diseases from the prejudice that results by reason of the plaintiff waiting seven years from the time of [39] diagnosis until the filing of suit. There has to be some affirmative showing by the defendant that there is real factual prejudice. I see none in this record and, therefore, I cannot grant the defendant's motion which is a partial summary judgment motion. I deny the motion on laches without prejudice to explore it further factually at the time of trial or before, but right now I have no record to base any finding of prejudice.

Any questions?

MR. TORTORETI: Your Honor, I'm assuming that our motion for summary judgment on the statute of limitations grounds is granted.

THE COURT: The motion is granted.

MR. TORTORETI: And the cross motion in all regards is denied because you think the cross motion also addressed the statute of limitations.

THE COURT: Yes.

MR. TORTORETI: Thank you.

MS. ROTHSCHILD: Thank you, your Honor.

THE COURT: The Order, however, should reflect that I have simply denied the motion on the defense of laches without prejudice.

MR. TORTORETI: I understand that.

[40] CERTIFICATE

I, STANLEY GRABON, C.S.R. # XI00377, an Official Court Reporter of the State of New Jersey do hereby acknowledge that the foregoing is a true and accurate transcript of my stenographic notes of the within proceedings to the best of my ability.

/s/ STANLEY GRABON

STANLEY GRABON, C.S.R.
OFFICIAL COURT REPORTER

[1] SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MIDDLESEX COUNTY
DOCKET NO. L-045449-87

DOMINICK ARMENTI and THERESA ARMENTI,
his wife, *et al.*,

Plaintiffs,

—v.—

CAREY CANADA, INC., *et al.*,

TRANSCRIPT OF MOTION

Middlesex County Courthouse
New Brunswick, New Jersey
Friday, September 16, 1988

TRANSCRIPT ORDERED BY:
Roseann Lynn Brenner, Esq.

APPEARANCES: WILENTZ, GOLDMAN & SPITZER, ESQS.
BY: ALAN M. DARNELL, ESQ.,
For the Plaintiffs.

[2] MCCARTER & ENGLISH, ESQS.
BY: GITA F. ROTHSCHILD, ESQ.,
For the Asbestos Claims
Facility Defendants.

GOLDFEIN & JOSEPH, ESQS.
BY: ROSEANN L. BRENNER, ESQ.,
For the Defendants A.C.L. & Bell.

CARY EDWARDS, ATTORNEY GENERAL
OF N.J.
BY: HARRY HAUSHALTER, ESQ.,
Deputy Attorney General,
For the Intervener.

June Andrian, C.S.R.
License X100362
Middlesex County Courthouse
P.O. Box 964
New Brunswick, N.J. 08903

[2] THE COURT: Armenti versus Carey Canada, Inc. et al., docket number L-45449-87.

Counsel, enter your appearances.

MS. BRENNER: Roseann Brenner for A.C.L. and Bell.

MS. ROTHSCHILD: Gita Rothschild for the Asbestos Claims Facility defendants.

MR. DARNELL: Alan Darnell for the plaintiff Armenti.

MR. HAUSHALTER: Attorney General's Office, intervener.

THE COURT: As indicated on the card that has been provided to me by my staff, this is a motion granting defendants relief from the Court's order of June 2, 1988, granting plaintiff's motion for partial summary judgment and denying defense' cross motion for summary judgment.

MS. BRENNER: That's correct, your Honor.

THE COURT: Basically what was the order that was granted at that time?

MS. BRENNER: Judge Keefe entered an order granting plaintiff's motion for partial summary judgment in effect striking defendants' defense of statute of limitations to the claim brought by a Dominick Cortese.

Defendants had cross claimed to plaintiff's motion because plaintiff had initiated the question of the constitutionality of the New Jersey tolling statute in their moving brief and the defendants picked up the ball [3] obviously and ran with it, and we challenge the constitutionality of N.J.S.A. 2A:14-22 which is the New Jersey Tolling Statute which tolls the Statute of Limitations to defendants and unrepresented foreign corporations who are not present in the State and cannot be served in the State, and provides for a designation of an agent to make them represented in the State. In other words,

all they have to do is file a designation with the Secretary of State to be considered present in the State.

THE COURT: All right. As I understand it, the basis for the rehearing so to speak of that motion is defense counsel's position that U.S. Supreme Court case of Bendix held the similar Ohio statute unconstitutional.

MS. BRENNER: That's correct.

THE COURT: The New Jersey statute should be unconstitutional.

MS. BRENNER: Your Honor, this case was initiated in 1987 under the title captioned Armenti, but Dominick Cortese is a plaintiff in this case. He brought this in 1987 for asbestos related which was diagnosed and freely admits in '80. That's the defense of the statute of limitations that he waited seven years to bring a suit. Therefore, that's the basis of our defense for the statute of limitations. Defendants submit plaintiffs had filed their motion for partial summary judgment to strike that [4] defense based on the New Jersey tolling statute.

If I may, in the process of giving procedure, I think it's important to give the Court just a brief history of the statute itself because there was a predecessor to this statute which the New Jersey Supreme Court declared unconstitutional because it did not provide for the designation of an agent. In order to designate an agent you had to register to do business. They considered that a forced licensor provision and therefore an impermissible burden on interstate commerce.

THE COURT: That's Coons 1.

MS. BRENNER: That's Coons 1. The burden was found to be to enable a defendant to get the benefit of the statute of limtations you were forced to register to do business and they considered that an impermissible burden for a foreign corporation to undergo. Now, there was also Coons 2 which held that was prospective and not retroactive in effect.

Defendants contest the constitutionality or contested before Judge Keefe on the basis that the current amended statute because the legislature after Coons 1 amended the New Jersey tolling statute to provide for a designation procedure where they didn't have to register to do business. They responded

directly to what the New Jersey Supreme Court did. The looked at the decision and [5] said okay, this is unconstitutional because we're making them registered business. Let them file notice with the Secretary of State to designate an agent. Therefore, it takes that burden from them, so the legislature did that. That brought in the current tolling statute.

Defendants then came and contested the constitutionality of that statute before Judge Keefe on the basis that statute is unconstitutional because it requires a defendant, an unrepresented foreign corporation who does not intend to be bound to the general jurisdiction or consent to the general jurisdiction of New Jersey, to designate an agent to accept service of process in New Jersey thereby consenting to the general jurisdiction. We contend that that was, in fact, a violation of the commerce clause. We also contend it violated equal protection and due process, and the crux of the argument and what the Sixth Circuit Bendix opinion and the United States Supreme Court opinion dealt with was the commerce clause. What I'm going to address only today is obviously the commerce clause.

We contended before Judge Keefe that, in fact, was not constitutional because it forced the defendant to choose between being liable forever to any claim brought by a New Jersey resident or waive personal jurisdiction in New Jersey which is something that A.C.L. and Bell do not want [6] to consent to the personal jurisdiction of New Jersey, and they find that an impermissible burden on interstate commerce since they are exclusively foreign corporations engaged in such.

Now, we relied also on the Bendix opinion which is a Sixth Circuit opinion. The Court in Bendix had ruled that an Ohio statute which stated that the statute of limitations was tolled as to defendants of corporations who were not present in the State it was tolled until they did become present in the State. It was a tolling provision for the statute of limitations if you're not present. To be present in Ohio you had to designate an agent.

The Sixth Circuit determined that that, in fact, was a violation of the commerce clause in that we essentially argued the

same thing to Judge Keefe in that they forced a foreign corporation to decide between being liable forever and not getting the benefit of the statute of limitations or submitting to get that benefit they would just have to waive personal jurisdiction, the right to contest personal jurisdiction.

Judge Keefe—this is obviously prior to the United States Supreme Court decision—Judge Keefe determined that the Bendix decision was not, in fact, binding upon himself or New Jersey Courts because the Ohio statute and New Jersey statute were distinguishable in that the Ohio [7] statute required in order to appoint an agent you would have a licensing procedure as the original New Jersey Statute had, and he stated that since the current New Jersey tolling statute allowed you to designate an agent, that they were distinguishable and that therefore he was not bound by what the Sixth Circuit said in Bendix.

He went a little further and stated that he considered the fatal flaw in Bendix—another reason why he wouldn't follow Bendix—the Bendix Court held that by designating an agent you waive the right to contest in personam jurisdiction. He felt that that was incorrect. He stated that one can't waive the right to contest personal jurisdiction. That was an organic right. We disagreed then and we still disagree with that.

THE COURT: Is there anything new by way of argument that you have that you didn't have before Judge Keefe?

MS. BRENNER: Yes. It all interchanges. That's why I'm giving you everything.

THE COURT: Okay.

MS. BRENNAN: If that's permissible to the Court.

THE COURT: Go ahead.

MS. BRENNAN: The Court has the papers. The Court is aware Judge Keefe also held that the statute did not apply to commerce because it affects individuals as well as foreign corporations. Therefore, he stated that he looked [8] to the Supreme court holdings in Velhmohos, New Jersey Supreme Court, and G.D. Searle, United States Supreme Court, where they challenged due process.

The Supreme Court stated that the prior New Jersey Statute was constitutional even though it required a license or

provision because the State had legitimate interest in protecting claims of its interest in locating hard to reach defendants and so he stated the Supreme Court found a legitimate State interest. I adopt that legitimate State interest. The current statute is simply trying to put everybody on the same ballfield. Therefore, there's no discrimination in in versus out of State people or corporations.

He went forward. He felt there was no other statute that could pass constitutional muster but for New Jersey's current tolling statute. Our motion for a cross summary judgment was denied and plaintiff's was granted. He upheld the constitutionality. Shortly thereafter, a matter of two or three weeks, the United States Supreme Court ruled on the Bendix decision, affirmed the Sixth Circuit. They found the Ohio statute which required the designation or appointment of an agent to be an impermissible burden on interstate commerce in that it forced by appointing an agent, it forced an unrepresented foreign corporation to submit to the general jurisdiction of the [9] States Courts for all actions.

The Court went further to discuss how a State statute which requires or conditions an ordinary legal defense such as the statute of limitations, which we all know is not a right but an ordinary legal defense, that if they condition that or take it away from an out of State defendant as opposed to an in State defendant, and that defendant was involved in commerce, then that statute would be reviewed under the commerce clause. They also stated that a statute which requires a corporation to appoint an agent . . .

(There is a pause.)

THE COURT: May I suggest you confer with counsel for a moment on that point?

MS. ROTHSCHILD: If I may be heard briefly.

THE COURT: Why don't you confer for a moment.

(There is a pause.)

MS. BRENNER: Excuse me. I apologize for the momentary blank on my part.

THE COURT: That's all right.

MS. BRENNER: The Court stated that any State statute that requires a foreign corporation to designate it agent, to accept service, and the corporation—excuse me.

(There is a pause.)

THE COURT: All right. You want to pause at this moment and let someone else speak or do you want to come [10] back to that point?

MS. BRENNER: If I can have one second to bring my thoughts together. I do believe this is a rather complicated issue because it involves so many different aspects and it's causing some difficulty in relating it to the Court.

THE COURT: You want me to take a short break?

MS. BRENNER: Could we? Would that be permissible, your Honor?

THE COURT: I'll do that.

(There is a recess.)

MS. BRENNER: If I could resume, your Honor. The Supreme Court in Bendix examined the Ohio statute. They stated that a statute that is acceptable or State interests that are acceptable under equal protection and due process clause, those interests may not be acceptable under the commerce clause or sufficient under the commerce clause to attain constitutionality for a particular statute. They did, in fact, refer to G.D. Searle in their opinion in Bendix. They stated yes, it's true a State has a definite interest in protecting a plaintiff, in trying to alleviate the burden on a plaintiff who must go the extra measure to serve an unrepresented defendant in an action in a given State, and that for those reasons a statute which would deny an ordinary defense or take away someone's [11] limitation period would, in fact, be constitutional. It passes equal protection, your Honor, because there's sufficient interest in the State.

They stated in this particular Bendix case that a State cannot justify a statute which takes away an ordinary legal defense or conditions it on a waiver of a right such as personal jurisdiction cannot be justified when you can, in fact, reach the foreign defendant, the unrepresented foreign defendant, by a long arm statute. They said this is not an acceptable State interest or sufficient State interest to permit the

deprivation or the withdrawal of an ordinary legal defense and condition that defense on a right that the party would otherwise have, an individual liberty interest that they would have.

The Court went further to say that when a statute requires an unrepresented foreign defendant to designate an agent to accept service of process or lose the statute of limitation, they are in effect making that defendant who designates an agent subject to the general jurisdiction of that particular State. They said, as they concluded throughout this entire opinion, this is an unacceptable and impermissible burden, totally unreasonable, and doesn't pass under the commerce clause. It's unconstitutional.

Now, I do believe that when Judge Keefe distinguished Bendix, he was distinguishing it on the basis that we had a [12] provision where you designate an agent by notice, and Ohio had a provision where you designate that agent because you had to register to do business and appoint an agent. The Supreme Court in Bendix is clear and reiterates throughout the entire opinion that if you designate or appoint an agent you are consenting to the general jurisdiction of that State and that is an unreasonable burden on commerce.

Now, plaintiff claims that the Supreme Court found the Ohio statute unconstitutional because it had no provision for the designation of an agent for service of process, for the sole and exclusive purpose of extricating a punitive defendant from the tolling provision.

We submit respectfully to the Court that the Supreme Court found the designation of an agent which subjects a foreign corporation to the general jurisdiction of the State, that was unreasonable. They made it clear the statute which requires foreign corporations to designate an agent to accept service would fall under the commerce clause because the act of designation of an agent itself, regardless of the method, whether it's by notice, whether it's by licensing, by registering to do business, regardless, that notice in and of itself results in the submission to the general jurisdiction of the forum. As I stated, and I don't want to repeat myself, the Court didn't

distinguish the forum in which you designate that [13] agent, whether it be by notice or by registering.

Plaintiff contends further that the New Jersey tolling statute allows for the foreign corporation to file a notice to designate an agent as opposed to the licensor in provision of Coons 1 to gain the benefit of the statute of limitation and that this provision makes it unconstitutional. Again that's not what the Supreme Court has ruled and the Supreme Court never even addressed remotely any distinction as to how you designate an agent. They state it clearly, just plain and simply, you designate that agent, you've consented to jurisdiction.

There are abundant Supreme Court opinions that speak to the issue of waiving or consenting to the general jurisdiction of the Court. One such opinion is the Insurance Corporation of Ireland, Ltd. v Campaign DES Beuxite, cite 456 United States 694. It was argued in the Third Circuit. Certiori was granted. It was decided on June '82, wherein the Supreme Court stated a defendant who takes advantage of certain State procedures can, in fact, consent by taking advantage of those procedures to the general jurisdiction of that State's Courts.

It went further to state that plaintiffs can take behavior or historic fact of a defendant's behavior and argue that they have consented to the jurisdiction of the Court by their behavior whether it be voluntary or in-[14]voluntary. Therefore, I throw that in to buttress my argument that the Supreme Court considers any designation of any agent of a foreign corporation to accept service of process to submit that foreign corporation to the general jurisdiction of a particular forum.

THE COURT: Let me just ask you this while you're pausing there a moment. If the statute were to say or were to be interpreted to say that designating or naming an agent submitted the defendant to jurisdiction of the Court but that the defendant could then argue that the Court did not have in personam jurisdiction, would that change things at all?

MR. BRENNER: Under the Supreme Court's ruling, which is Bendix, I don't believe it would. I believe by the mere vir-

tue of your appointing that agent, whether or not you can go in and argue later, you've already put someone there to accept your service and consent to the jurisdiction of that State, the Supreme Court, and also there's no statutory provision which permits the Secretary of State to accept such a designation number one. Number two, we don't know that that's proper. Number three, it's my feeling that your Honor is looking to the law which calls on the Court to interpret a statute constitutionally if it is at all possible, and this is one of the reasons why I gave you all that history about Coons 1. [15] The legislature did, in fact, intend for the statute to be constitutional. There's no question about that. What they tried to cure in their amendment was the burden of registering of every foreign corporation registering to do business, not the burden that the Supreme Court has found in a similar statute of consenting to the general jurisdiction of the State.

We submit and we firmly urge the Court that no matter what kind of designation you file, you have just created your consent to the general jurisdiction of the State and any suit can go and pick up a piece of paper and regardless of your designation say here, they filed this. They've consented to the jurisdiction. I have a cause against them. You have jurisdiction. I do believe the Supreme Court rulings, the Insurance Corporation of Ireland case, state that defendant's action, regardless if you try to limit it, is only a piece of paper, and the Secretary of State accepts it without statutory support, I might add, that you still consent to the general jurisdiction of the Court.

THE COURT: Miss Rothschild, is there anything you wanted to add to the argument?

MS. ROTHSCHILD: I'll be very brief, your Honor. Stated very simply, the reason we're back in court talking about this statute is because the Supreme Court in Bendix [16] said that Judge Keefe was wrong when he said that a tolling statute which merely required the appointment of an agent for service of process was constitutional.

Your Honor has now asked whether if the statute were interpreted to permit a party to come in later and argue that there was no in personam jurisdiction would it then be con-

stitutional and I believe your Honor is alluding to the Attorney General's argument that they, in fact, have been permitted in the case of Cassiar Asbestos Company a limited designation. I believe he attached a copy of that limited designation to his papers and the limited designation saying they are only designating an agent for service of process in order to receive process but that they in no way consent to the jurisdiction of the Court.

THE COURT: Let me stop you right there. Actually I had asked the question if the statute actually said that, or the Court interpreted the statute that way, what would the Bendix effect be?

MS. ROTHSCHILD: I think if the statute actually said that, we might be on weaker ground under Bendix because Bendix itself says the suggestion that Midwesco had the simple alternative of designating an agent for service of process in its contract with Bendix or tendering an agency appointment to the Ohio Secretary of State is not persuasive. Initially there is no statutory support for either [17] option and so the Supreme Court is troubled by the fact that the statute itself does not provide for a limited designation and so I think it would make a difference here were such statutory support for a limited designation. I would feel more comfortable representing my clients and advising them to file such a limited designation if I could point to the tolling statute and say, you see, it really is okay. The legislature says so. You are not submitting to the general jurisdiction of the Court.

Now the Attorney General says there is no statutory support but we have done it and look here. Here's the case of Cassiar. And I say, number one, Cassiar apparently is taking its chances as to how that limited designation will be interpreted by the many Courts in New Jersey. Number two, that hasn't been tested yet. I don't believe that Cassiar has come forward on a motion for summary judgment asserting the statute of limitations where they have said, listen, we filed this designation so that we could take advantage of the statute and here we are, we want to take advantage of the statute, and there hasn't been any kind of a legal determination about whether or not that, in fact, operated to exclude them

from the provisions of the tolling statute which I think is the reason why the Supreme Court was looking for statutory support, so I think, yes, there would be a difference.

[18] THE COURT: Okay.

MR. HAUSHALTER: May it please the Court, I think we have an issue that for us, one, attempting to decide what the Supreme Court in Bendix really says, I don't think the Supreme Court in Bendix really dealt with our statute. I don't think the Supreme Court in Bendix is telling your Honor how to rule in this case.

We have a statute. It's a different statute than what we have in Ohio. Our statute does not require the designation of an agent as part of the process of registering to do business. The Ohio statute did and that's why in the Ohio statute you had no limitation with regard to the nature of representation. When you register to do business you have to go through the entire routine that is involved with that procedure, including the representation or designating of an agent for general jurisdiction. We don't have that requirement.

Our statute was amended after Coons 1 specifically to allow unregistered corporations to designate an agent for purposes of service of process. The statute does not say that that's for purposes of designating an agent for general jurisdiction. It is silent on that. We maintain that we have a policy, the Secretary of State has a policy of accepting the designations which are limited, namely, to the point where the foreign corporation is saying to New [19] Jersey and to New Jersey plaintiffs for service of process this is our agent but only with regard to those types of actions where there is due process minimial contact. That is the way our statute now has to be interpreted in order to make it constitutional. There's no question about that. That is one thing that Bendix does tell us.

We maintain that is, in fact, an appropriate viable way of interpreting our statute and that's the way the statute must be interpreted. If it is not we have no tolling statute. We have no tolling statute unless our position is sustained by the Court because there is nothing else the legislature can do. If our interpretation, the way we are indicating the statute

should be interpreted is unconstitutional, then the fundamental right of a legislature to enact a tolling statute is lost, but there is nowhere in Bendix where that is said. In fact, the Court in Bendix tried to indicate very clearly that if we have a system where the designation is limited and only establishes the designation for purposes of those actions which are based on the long arm aspect, then we have a constitutional designation, and that's all we are saying here today. That is the exact way we are indicating to the Court that statute should be interpreted, and so again we have nothing from Bendix that tells this Court that under our interpretation our statute is unconstitutional.

[20] Judge Keefe was absolutely correct. That is exactly what Judge Keefe said. He says he must interpret our statute so that the designation of the agent is limited only with regard to causes of action which have minimum contact in this State. There's nothing that Bendix said that indicates Judge Keefe is wrong. Judge Keefe is absolutely right. We agree with Judge Keefe. His position is even stronger now because, in fact, what he has indicated is the way the statute must be interpreted in order for it to be constitutional.

We've indicated in our brief, your Honor, the established principles of construction that our Courts have utilized, namely, to attempt to interpret statutes so that they have a constitutional result, and clearly had our legislature known about Bendix would have made that statute clear. After Coons 1 our legislature came and very quickly enacted an amendment in order to make our statute constitutional.

The policy of the State is very, very clear and that's noted also in the Coons 2 decision and in the Searle decision by the Third Circuit. The policy that this State has with regard to attempting to have a viable tolling statute and all of that supports an interpretation that we are seeking this Court to sustain.

MR. DARNELL: Your Honor, I'll do my best to be [21] brief. I agree with everything Mr. Haushalter has said to the Court. I'd like to add in Coons 1 our Supreme Court of New Jersey said that the old tolling statute violated the commerce clause because it required a waiver of one's jurisdictional

defenses as part of the licensor provisions and therefore exacted too much of a burden and therefore violated the commerce clause. Bendix doesn't say much different. It says the Ohio statute they interpreted requires the same thing.

What we're faced with is a question of statutory interpretation. We are not in Ohio. We are in New Jersey. In New Jersey we've already gone through the process that was alluded to in Bendix of statutory support. The first statute was said to be unconstitutional in Coons 1. Our legislature passed a new statute in response to that.

In response to the statement by the Supreme Court of New Jersey that you cannot constitutionally have a statute that requires a waiver of jurisdictional defenses as a condition of appointing an agent for service of process, it was clearly the intent of the legislature who was invited by the Supreme Court to give it another try. It is set forth in the statutory history that is at one point set forth at page 5 of the Attorney General's brief. There was no doubt, there can be no doubt, that the legislature [22] intended to pass a constitutional statute. If passing a constitutional statute means it must be interpreted so as not to require a waiver of jurisdiction then sobeit. That's what the legislature wanted as set forth in the legislative history.

Had the statute said by appointing such service of process a corporation hereby expressly waives any jurisdictional defenses and expressly subjects itself to jurisdiction, we might be in a different situation though even then this Court could do judicial surgery on the statute as is allowed as was done by the Supreme Court of New Jersey in the Chamber of Commerce case that's referred to in the briefs. In any event, as I said before, we're not in Ohio. We're in New Jersey. The change have been made to the statute, and to interpret the statute as the defendants request would require this Court to look for a way to find it unconstitutional which would be completely contrary to the mandates of our Supreme Court which is you look for a way to find the statute to be constitutional.

Because we're basically dealing with statutory reconstruction and interpretation, I don't believe that the Bendix case

restricts this Court in any way, shape or form from construing a New Jersey statute, which statute has never been construed by the Supreme Court of the United States. To the contrary, in Velmohos the Supreme Court [23] sent it back to the Supreme Court of New Jersey to construe what they found to be—maybe they sent it back to the Third Circuit—an opaque comment in Velmohos as to whether or not our previous statute required a waiver of jurisdictional defenses; that by some fortuitous path of appellate history ended up in the Coons 1 case.

So, I think that based on what I've said it's clear as could be that the legislature intended to pass a constitutional statute; that they passed the new statute, the statute under attack here, in response to the statement of Coons that you can't have a statute that requires waiver of defenses. And to read this statute to require such a waiver is to go against the well-established rules of statutory construction and would be in direct disagreement with the way that Judge Keefe interpreted this very same statute in June of 1988. Thank you, your Honor.

THE COURT: Is there anything you wanted to say further?

MS. ROTHSCHILD: Yes. I think that the Attorney General and Mr. Darnell both concede that but for the Attorney General's statement that a limited designation will be accepted. Bendix requires the New Jersey statute to be declared unconstitutional because Bendix says whatever the difference is between the Ohio statute and the New Jersey statute, even if the mere appointment of an [24] agent for service of process was the only thing that a foreign corporation had to do, it would be unconstitutional because it would be a submission to the general jurisdiction of the Court.

Mr. Haushalter has said we understand that Bendix requires that we accept limited designations so there's nothing more the legislature could do in passing a statute. We're accepting limited designations and that makes it okay under Bendix. The answer is there is more the legislature could do. It could provide the statutory support that the United States Supreme Court was looking for for that kind of an act, and the Supreme Court was unhappy that it wasn't in the Ohio

statute, that kind of assurance, and it would be equally unhappy that it's not in the New Jersey statute.

THE COURT: I think I've heard sufficient argument unless somebody has a new point to raise.

MS. ROTHSCHILD: Your Honor, it is actually new. I would like to respond to Mr. Darnell's comments about Coons 1 and the basis upon which the New Jersey Supreme Court did evaluate the original New Jersey statute as unconstitutional. I have the opinion right here, page 318. The question is whether the denial of the statute of limitations defense to an unlicensed foreign corporation forces that corporation to obtain a license. That was the burden [25] that the Court found. The New Jersey Supreme Court found the burden to be forcing them in order to get the benefit of the statute of limitations to register to do business. They tried to do indirectly what they couldn't do directly, number one.

Number two, I think it's important for the Court to note the Supreme Court stated quite clearly in the third paragraph from the end of its opinion that a State interest to protect the plaintiffs to have viable claims against unrepresented foreign corporations isn't sufficient, period, where you have a long arm statute and you can reach that defendant.

It's clear they reached A.C.L. and Bell within days of filing the Complaint through the long arm service. There's no question but that they could have in 1980 obtained service on these defendants. The Supreme Court says you can't have a tolling statute that takes away ordinary defenses unless you give up a right. I think the Supreme Court is saying you can't do that. That's unconstitutional, and no matter what you do to a statute, whether you let them file a paper, yes, you notice the designation as opposed to licensing, it's unconstitutional, period. That's all I wanted to say.

MR. HAUSHALTER: May I respond to that because I think that's a twist that was not initially noted. That [26] statement is somewhat inaccurate and misleading with all due respect to counsel. The Supreme Court made a balancing analysis and said that this public policy that the State has to allow plaintiffs to file suit against these unrepresented foreign corporations is outweighed when the tolling statute requires the

foreign corporations to submit to the general jurisdiction of the State. That's the key. The balancing under that factual analysis goes for the defendants and goes against the tolling statute. What we're saying is we have a new balancing approach, your Honor. Our balancing approach is the policy of the State versus forcing these foreign corporations to come in and only submit to limited jurisdiction. Under that balancing approach, your Honor, the statute should be sustained and I think that's where Bendix is not applicable because Bendix doesn't deal with that analysis. Thank you, Judge.

MS. BRENNER: If I may, there is no statutory support in New Jersey statutes for any limited designations. Thank you.

THE COURT: All right. On this motion the issue really is what the effect of the Supreme Court Bendix opinion has on our statute of limitations which is N.J.S.A. 2A:14-22 which reads in pertinent part, where a person is not represented in this State by any person or officer upon whom summons or other original process may be served, **[27]** therefore they shall not be computed as part of the time period within which a statute can be started. And in the final paragraph it states, "A corporation shall be deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process."

The Court finds that this statute was amended in response to the Coons 1 decision which held that the prior statute was unconstitutional because it required the foreign corporation to submit to the jurisdiction of the court. I believe that the Attorney General, Mr. Haushalter, has correctly stated the law when he says the Court, when deciding constitutionality of the statute, has the right and the duty to interpret it in such a manner that would remain constitutional if that is the intended purpose of the legislature. He argues further in effect that the legislature's quick response to the Coons 1 decision indicates that they, the legislature, were attempting to pass a statute that would be constitutional. I accept that argument also.

The question then remains does the naming or designating of a representative by the notice required by Statute N.J.S.A.

14-22 to accept service of process eliminate the right of a defendant to contest to personal jurisdiction. The statute doesn't say it does. The **[28]** Court has a right to perform judicial surgery so to speak. I will avail myself of that right and I will interpret the statute to read that there is no waiver by the foreign corporation in providing the notice under the statute. There is no waiver of the right of that foreign corporation to contest service of process and to contest in personam jurisdiction. In view of that I find the statute to be constitutional and therefore the motion is denied.

I hereby certify that the foregoing is a true and accurate transcript of proceedings as taken stenographically by me at the date and at the place hereinbefore set forth.

/s/ JUNE ANDRIAN, C.S.R.
June Andrian, C.S.R.
OFFICIAL COURT REPORTER

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. AM-1642-89T3

MOTION NO. M-6197-89

Before Part: Q

Judges: HAVEY AND STEIN

CHERYL A. DIFALCO

—VS.—

SUBARU OF AMERICA, INC. et al.

ORDER ON MOTION

MOTION FILED: July 6, 1990

ANSWER FILED: July 18, 1990 BY: Attorney General

SUBMITTED TO COURT: July 30, 1990

ORDER

This matter having been duly presented to the court, it is on this 31st day of July, 1990, hereby ordered as follows:

Motion by appellant Takata Corporation for Leave to Appeal is GRANTED.

SUPPLEMENTAL:

[STAMP
Illegible]

FILED
APPELLATE DIVISION

AUG 6 1990

[Illegible]
Clerk

FOR THE COURT:

JAMES M. HAVEY

James M. Havey J.A.D.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-6247-89T3F

CHERYL A. DIFALCO

—VS.—

SUBARU OF AMERICA, INC. et al.

SCHEDULING ORDER

An appeal having been filed in the above-captioned matter,

IT IS HEREBY ORDERED that the time for filing and serving transcript(s), briefs and appendices shall not be later than as set forth below:

(a) Transcript(s) (including Statement of Items Comprising the Record, where applicable): due September 6, 1990

(b) Brief and appendix of appellant: due September 6, 1990

(c) Brief and appendix (if any) of respondent (including, in case of cross-appeal, issues raised therein): due September 27, 1990

(d) Reply of appellant (including, where applicable, response to cross-appeal): due October 4, 1990

(e) Reply brief, if any, of respondent (only in case of cross-appeal):

IT IS FURTHER ORDERED that an original and four (4) copies of each brief shall be filed with the Clerk and within ten (10) days thereof a proof of service shall be filed with the Clerk indicating that two (2) copies of the brief and appendix

were served on each party to the appeal, and one (1) copy of the transcript was served on any one respondent for the use of all respondents; and

IT IS FURTHER ORDERED that in the event of default by appellant in filing the appellant's brief and appendix by the time directed or upon default of the appellant regarding any other provision of this order, THE APPEAL SHALL BE DISMISSED WITHOUT FURTHER NOTICE; and

IT IS FURTHER ORDERED that if any respondent fails to file a brief within the time directed by this order, such respondent shall be precluded from further participation in the appeal.

Witness, the Honorable Herman D. Michels, Presiding Judge for Administration, at Trenton, this 8th day of August, 1990.

pjl

Emille R. Cox
Acting Clerk

T-15
11/88

Original Filed
Nov. 2, 1988

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Attorney General of New Jersey
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By: Harry Haushalter
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

HONORABLE JOHN C. LIFLAND

Civil Action No. 86-5059(JCL)

PIERRE ROBINSON,

Plaintiff,

—v.—

VISUAL PACKAGING, INC., et al.,

Defendants.

AFFIDAVIT OF PAUL E. WERMUTH

STATE OF NEW JERSEY:

ss.

COUNTY OF MERCER:

PAUL E. WERMUTH, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am an Attorney-at-Law licensed to practice in the State of New Jersey since 1976.

2. I have been employed by the Secretary of State of the State of New Jersey since 1982. During this period, I have served as legal advisor to the Secretary of State and have simultaneously been general manager of three of the Department's divisions, including the Division of Commercial Recording.

3. Particularly because of my supervisory responsibilities over the Division of Commercial Recording, I am familiar with the practices and policies of the Secretary of State regarding the recording of designations of agents by foreign, unregistered corporations.

4. As a result of an amendment to *N.J.S.A.* 2A:14-22 (*L.* 1984, *c.* 131), the Legislature permitted unregistered, foreign corporations to file with the Secretary of State a notice advising of the designation of a representative for purposes of accepting service of process as a means of avoiding the tolling of the statute of limitations.

5. Upon the advice of the New Jersey Attorney General, the Secretary of State permits the filing of designations by unregistered, foreign corporations of representatives for service of process only with respect to causes of action which have the minimal contacts for due process purposes in this State. Such designations are recorded by this office and insulate the foreign corporations filing such designations from causes of action which have no nexus with New Jersey.

6. Attached to this affidavit as Exhibit A and made a part hereof is a copy of a designation of a representative for service of process filed by Cassiar Mining Corporation (formerly Brinco Mining Limited) and recorded in the Secretary of State's office.

/s/ PAUL E. WERMUTH
PAUL E. WERMUTH

Sworn and Subscribed to
before me this 8th day
of September, 1988.

/s/ VIRGINIA LEE D'ERRICO

VIRGINIA LEE D'ERRICO
Notary Public of New Jersey
My Commission Expires
September 18, 1988

DESIGNATION OF AGENT PURSUANT TO
N.J.S.A. 2A:14-22

Cassiar Mining Corporation, (formerly named Brinco Mining Limited), a Canadian corporation with its principal place of business in Vancouver, British Columbia, Canada, hereby designates The Corporation Trust Company, 28 West State Street, Trenton, New Jersey 08608, as its representative in New Jersey to accept services of process in these suits, and only these suits, where Cassiar is properly subject to *in personam* jurisdiction under New Jersey's long-arm rule, R. 4:4-4.

This appointment of agent was authorized by resolution duly adopted by Cassiar Mining Corporation's Board of Directors.

By: /s/ [ILLEGIBLE] Title: Secretary

Date: September 25, 1985

FILED
Oct. 5, 1985
[Illegible]
Secretary of State

EXHIBIT A

MORLEY, CRAMER, TANSEY, HAGGERTY & FANNING, ESQS.
521 Green Street, P.O. Box 5555
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Attorneys for Defendant, TAKATA CORPORATION
Our File No. T-5489

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: PASSAIC COUNTY
DOCKET NO. W-019907-88

Civil Action

CHERYL A. DiFALCO,

Plaintiff,

vs.

SUBARU OF AMERICA, INC., FUJI HEAVY INDUSTRIES, LTD., and TAKATA CORPORATION

Defendant(s).

ORDER FOR SUMMARY JUDGMENT

THIS MATTER having come before the Court on the Motion of Morley, Cramer, Tansey, Haggerty & Fanning, Esqs., attorneys for defendant, Takata Corporation, for an Order granting Summary Judgment, and the Court having had opportunity to review all moving papers and any papers filed in opposition thereto, and for good cause shown;

IT IS on this 21st day of June, 1990,

ORDERED that motion is denied.

IT IS FURTHER ORDERED that a copy of this Order be duly served and filed on all parties within seven (7) days of receipt by movant of a copy of this executed Order.

/s/ [Illegible], J.S.C.

[Illegible], J.S.C.